DEPARTMENT OF JUSTICE

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BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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FEBRUARY 7, 2008

DEPARTMENT OF JUSTICE

THURSDAY, FEBRUARY 7, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 11:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Wexler, Sánchez, Cohen, Johnson, Sutton, Weiner, Schiff, Davis, Ellison, Smith, Sensenbrenner, Coble, Goodlatte, Chabot, Lungren, Cannon, Issa, Forbes, King, Feeney, Gohmert, and Jordan.

Staff present: Sam Sokol, Majority Counsel; and Crystal Jeziersky, Minority Counsel.

Mr. CONYERS. Good morning.

The Committee will come to order.

I am pleased to welcome the Attorney General of the United States, Mr. Michael Mukasey, who oversees what I consider to be the most important agency in the Federal Government, with jurisdiction over voting rights, civil rights, criminal and civil justice, antitrust, intellectual property enforcement, and bankruptcy, to name the major areas.

He assumes a very large responsibility, and I look forward to a productive relationship between him and the Members of this Committee.

At the outset, I note that the Attorney General did not respond in advance to the five areas of questions I outlined in my letter to him of last week, because we know how truncated the 5-minute rule is, with all of our Members and him.

The 5-minute rule is always the more efficient mechanism for disclosing information, while written questions submitted after a hearing takes months to respond to. And so I hope that we receive timely written responses to any questions that may need further expansion on after the hearing.

I would like to emphasize the areas that I would point to the Attorney General as very important to me.

I continue to be frustrated by the Administration's failure to fully and frankly address our Nation's position on the odious practice of waterboarding.

During confirmation proceedings, Mr. Mukasey was asked about waterboarding and said he would examine the underlying memos and underlying facts about what this country has done and try to explain it to Congress. But after his confirmation he has not stated

whether waterboarding is torture or illegal, saying there are some circumstances that current law would appear to prohibit and other circumstances would present a far closer question.

Just this week, we learned that the Central Intelligence Agency agents have engaged in waterboarding, and that Federal prosecutors appear to have known about the destruction of CIA interrogation tapes for more than a year before taking any action.

My question today is, will the Attorney General tell us, today, here, whether he is willing to conduct a criminal investigation into these confirmed incidents of waterboarding?

Now, no issue is more important to most of us on this Committee than the voting rights and fair access to the ballot box.

I have high hopes that the department and this Committee can work together to ensure that the 2008 elections are as fair and open—more so than any in our history.

We already have concerns about voting problems and questionable tactics in the ongoing presidential primaries. And I hope that the Attorney General will tell us and work with on exactly what we all need to do together, his Committee—his department, our Committee, Senate Judiciary Committee, to set up the comprehensive working operation with the Voting Section in his department, and staff, so that we can ensure that every available resource is being deployed to protect the most valued right in a democracy, to cast the vote and have it counted.

I yield a minute to Bobby Scott, Chairman of the Crime Subcommittee. Then I will return to the Ranking Member, Mr. Smith.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. And I thank the Attorney General for being with us today.

And I want to express my appreciation for your willingness to cooperate with us and attend this hearing.

I talked to you yesterday, and indicated that we had a hearing recently about a young lady that was raped in Iraq that needed to be investigated. We had a hearing on that, and the Justice Department did not send a representative.

I understand that we are going to do better than that in the future. We need to look into civil rights, religious discrimination, to make sure that Federal contractors are not able to discriminate based on religion and other civil rights cases where—and we talked yesterday about a case in North Carolina where a person was held, apparently, without with a trial date for well over a year. We need to make sure that the Justice Department actually looks into cases like that, and we can count on you and the Department of Justice in looking into cases like that to make sure that civil rights are not being violated.

Human trafficking cases need to be prosecuted.

And, finally, crack/powder cocaine disparity—the Sentencing Commission unanimously agreed that existing crack/powder disparity was unjust, that it was racially discriminatory.

And I just wanted to quote what a Republican-appointed judge, who indicated that, "We need to have faith in the American judicial system to do all that we can do to ensure that violent offenders are not released early and to address fundamental injustices in the criminal justice process." Judges—he mentions, "Judges can be re-

sponsible in exercising their discretion to make sure that the wrong people are not released."

Over the next 7 to 10 years, 20,000 people will be released under this adjustment. Six hundred thousand people are released from jails and prisons every year.

Mr. CONYERS. The gentleman's time has expired.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CONYERS. I am pleased now to turn to our Ranking Member, Lamar Smith of Texas, for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman.

General Mukasey, first of all, congratulations to you on your confirmation. And, also, welcome to your first appearance before the House Judiciary Committee.

Last year was a difficult year for the Department of Justice. It was a year during which the department and its dedicated employees were shrouded by the controversy created after the resignation of several U.S. attorneys.

Responding to the U.S. attorneys resignations, the Committee conducted vigorous oversight, holding 15 hearings, interviewing 20 Administration officials, and reviewing 8,500 pages of documents.

Yet, at the end of the review, all we found was that the Administration officials had already admitted poor management of a legal process.

The Committee last year spent more time on White House personnel investigations than on national security, violent crime and sexual predators combined.

Preventing another terrorist attack is the most critical work facing the department today. Just this week, the director of national intelligence, Admiral Michael McConnell, warned that Al Qaida is increasing its preparations for an attack on the United States. Terrorists planned an attack on the White House as recently as 2006.

The Foreign Intelligence Surveillance Act, FISA, is critical to our ability to prevent terrorist attacks on our Nation. Today the Senate continues its consideration of legislation to modernize FISA. This bipartisan bill, negotiated with the Administration, updates our intelligence laws to mirror today's technologies and provides liability protection to the telecommunication companies.

The Protect America Act expires next week. The Senate must pass a strong bipartisan bill. And when they do, the House must act quickly to pass the bill and send it to the President.

This is not the time for partisanship. This is the time for responsible action.

Additionally, I look forward to hearing from you on the progress of the National Security Division, created by the Patriot Act reauthorization to streamline the department's counterterrorism work.

The Justice Department also plays an important role in protecting the American economy. Counterfeiting and piracy of intellectual property cost American jobs, reduces American prosperity, and threatens the existence of American companies. I look forward to hearing from you regarding your efforts in this area as well.

As we enter a presidential election year, we are reminded of the department's role in enforcing Federal election laws. We must maintain the integrity of our election process by ensuring that all

qualified citizens are eligible to vote and that these votes counted—are counted fairly and honestly.

We must also ensure that individuals who are not eligible to vote do not exploit this essential freedom.

I realize that enforcing election laws opens the department up to criticism from those who would claim voter intimidation. But our right to vote is meaningless unless it is legal and protected.

The department must vigorously preserve the integrity of the election process by enforcing the election laws Congress has enacted.

I am also very concerned by the March 3 deadline you mention in your statement. If Congress does not act now, 1,600 convicted crack cocaine dealers will be eligible for immediate release into our communities nationwide. Many of these criminals are dangerous repeat offenders who possessed firearms during the commission of their crimes.

The early release of these individuals poses a significant threat to Americans' neighborhoods. And that is why last December I, along with eight of my Republican colleagues on this Committee, introduced legislation to amend the Federal sentencing guidelines. A strong Justice Department is in the best interest of the American people. The Committee must refocus its efforts to help the brave men and women of the Justice Department to better enforce the law, protect America from future attacks, fight crime, and ensure justice for all.

General Mukasey, I look forward to hearing from you regarding the state of the department, and to working with you to ensure that the department functions at the highest level possible.

And again, thank you for being here today.

Mr. CONYERS. Thank you, Lamar Smith.

Attorney General Mukasey brings a long, distinguished background to the Department of Justice: a Yale Law School graduate, a longtime practicing attorney, a Federal prosecutor, and then a member of the firm of Patterson, Belknap, Webb and Tyler.

In 1988, he was appointed a trial judge in the Manhattan Federal court by President Reagan, and served in that post for 18 years, including 6 of which he was the chief judge of the district.

On his retirement, he returned the practice, only to be called back to public service and was nominated by President Bush and confirmed by the United States as Attorney General in the fall of 2007.

On behalf of the entire Committee, we welcome you to our hearing and encourage you to respond to as much of the questions that have been put to you already as you can.

TESTIMONY OF THE HONORABLE MICHAEL MUKASEY, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. MUKASEY. Thank you, Mr. Chairman.

Chairman Conyers, Ranking Member Smith and Members of the Committee, thank you for the opportunity to testify about the important work being carried out by the men and women of the Department of Justice and for permitting me to highlight the key challenges that lie ahead.

In the short time that I have been at the department, I have confirmed what I hoped and expected to find: men and women who are talented, committed, and dedicated to fulfilling its historic mission.

That mission is to advance justice by defending the interests of the United States according to the law; to protect Americans against foreign and domestic threats; to seek just punishment for those who violate our laws; to assist our state and local partners in combating violent crime and other challenges; and to ensure the fair and impartial administration of justice by protecting the civil rights and liberties that are the birthright of all Americans.

These values are central to the mission of the department, and defining features of our democracy. And I thank the Committee for its efforts to help realize them.

During my tenure, I have sought opportunities to work with Congress to ensure that the department is provided the statutory tools necessary to fulfill the department's crucial mandate.

I have also sought to keep Congress apprised of the department's activities and policy positions, where possible, and to respond to the Committee's oversight requests in a spirit of inter-branch comity that respects the institutional interests of the department and the Congress.

I pledge to maintain this commitment throughout my tenure as Attorney General of the United States.

I would like to focus on two crucial legislative issues pending before Congress: the pending expiration of the Protect America Act and the pending effective date of the United States Sentencing Commission's decision to make a wide range of violent drug offenders eligible for a retroactive reduction of their sentence. I hope to work with Members of this Committee to address each of these problems.

As this Committee is aware, the Protect America Act will soon sunset, but threats to our national security will not expire with it. The statements and orders of Al Qaida and related organizations do not come with a sunset provision.

I urge Congress to pass long-term legislation to update the Foreign Intelligence Surveillance Act, known as FISA, to ensure that this statute addresses present and emerging threats to our national security.

S. 2248, the FISA Amendments Act of 2008, includes tools contained in the Protect America Act that have allowed us to close critical intelligence gaps.

In addition, this legislation protects telecommunications companies now under legal assault because they are believed to have responded to the government's call for assistance in the aftermath of September 11.

The Protect America Act is set to expire in just days and it is vital that Congress enact long-term FISA modernization legislation, with retroactive immunity, before that Act expires.

S. 2248, which is a strong, bipartisan bill, reported out of the Senate Select Committee on Intelligence by a 13-2 margin, is a balanced bill that includes many sound provisions that would allow our intelligence community to continue obtaining the information it needs to protect the security of America while protecting the civil liberties of Americans.

Modernization of FISA is a critical part of this effort. The department will have grave concern about any legislative proposal that ignores the continuing nature of the terrorist threat, that denies the intelligence community and law enforcement the long-term statutory tools necessary to defend the United States.

The department respects the oversight authority of Congress. But sunset provisions create uncertainty in the intelligence community and stifle the development of stable partnerships necessary to detect, deter and disrupt threats to our national security.

It is also critical that Congress provide liability protection to electronic communication service providers in enacting a reauthorization bill.

Contrary to the assertions of some, the legal protections contained in the S. 2248 bill do not confer blanket immunity. Rather, protections apply in limited and appropriate circumstances as reviewed by a court.

We believe this approach represents the best way to provide retroactive immunity against these claims, and urge Congress to pass legislation containing these protections.

While we appreciate the work of the House of Representatives in holding hearings and considering the challenges posed by the outdated provisions of FISA, the bill passed by the House, H.R. 3773, falls far short of providing the intelligence community with the tools it needs to collect foreign intelligence effectively from individuals located outside the United States.

We cannot support this bill, which does not provide liability protection, would sunset in less than 2 years, requires private court—prior court approval of acquisitions targeting persons outside the United States except in emergencies, and limits the type of foreign intelligence information that may be collected.

I would now like to focus on an issue that will have an impact on community safety nationwide: the Sentencing Commission's decision to apply retroactively, effective March 3, 2008, a newer and lower guideline sentencing range for crack cocaine trafficking offenses.

Unless Congress acts by the March 3 deadline, nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for immediate release into communities nationwide. Retroactive application of these new lower guidelines will pose significant public safety risks.

Many of these offenders are among the most serious and violent offenders in the Federal system, and their early release, without the benefit of appropriate reentry programs, at a time when violent crime has increased in some communities, will produce tragic but predictable results.

Moreover, retroactive application of these penalties will be difficult for the legal system to administer, given the large number of cases eligible for resentencing, now estimated at upwards of 20,000, and uncertainties as to certain key legal issues that remain unresolved.

I understand the commitment of Members of this Committee to community safety and would appreciate the opportunity to work with this Committee and this house to address the retroactivity issue in an expedient manner, while beginning discussions on

changes to the current statutory differential between crack and powder cocaine offenses.

Let me conclude with the following observation. While differences between this Committee and the department are inevitable and are consistent with the institutional tension embodied in the Constitution, which is our founding document, it is worthwhile to remember what unites us.

We each swear an oath to defend the Constitution of the United States and to uphold the high ideals of public service to which we are entrusted. We must not lose sight of the common goals and common purpose that unify the Department of Justice and Members of this Committee who support its historic and ongoing mission.

I have submitted a more extensive statement for the hearing record and would be pleased to answer any questions that you might have.

Thank you very much.

[The prepared statement of Mr. Mukasey follows:]

PREPARED STATEMENT OF THE HONORABLE MICHAEL B. MUKASEY

Department of Justice

STATEMENT OF

THE HONORABLE MICHAEL B. MUKASEY
ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE"

PRESENTED

FEBRUARY 7, 2008

Good morning, Chairman Conyers, Congressman Smith, and Members of the Committee. Thank you for the opportunity to testify before you today about the important work being carried out by the men and women of the Department of Justice.

I would like to highlight some of the Department's significant accomplishments this past year, and address issues of interest to the Committee. I will also discuss legislative priorities for the Department, most pressingly, the urgent need to make permanent reforms in the area of foreign intelligence surveillance before such provisions expire. I am ready to answer your questions, and I look forward to a productive discussion.

My tenure at the Department began less than three months ago. Even in this short time, Mr. Chairman, I have confirmed what I had hoped and expected to find at the Department: men and women who are talented, committed, and dedicated to fulfilling its historic mission. That mission is to defend the interests of the United States according to the law; to ensure public safety against threats both foreign and domestic; to seek just punishment for lawbreakers; to assist our State and local partners; and to ensure fair and impartial administration of justice for all Americans, including protection of civil rights and civil liberties. The Department's employees pursue this mission every day. In my view, the Justice Department is the finest group of lawyers anywhere. For that, I can and do take absolutely no credit. They were at the Department, doing an outstanding job, before I arrived, and they will continue to serve the American people superbly long after I am gone.

As I have served, I have tried to look for opportunities to work with the Congress, and to keep the Congress informed about the Department's activities and policy positions where possible. The lines of communication must always remain open, and every effort be made to accommodate our respective interests. Of course, we will not always agree. There are policy initiatives that the Department supports that some members of this Committee vigorously oppose, and initiatives that some members support with which the Department takes issue. There may be different perspectives on how the Department should pursue particular cases. Although these tensions will never disappear, there are many areas of agreement where we can work together on behalf of our common clients, the people of the United States. I have tried to work with the Congress in this spirit.

I would like to use the remainder of my statement to highlight the Department's efforts and accomplishments in recent months in five critical areas: national security, violent crime, civil rights, immigration and border security, and public corruption. I then will turn to some of the high-priority legislative issues currently before the Congress. I will conclude with an area that has been of great interest to some Members of this Committee and to many in the public.

Protecting America's National Security

I will tell you that the process of becoming familiar with the intelligence detailing the threats facing this country has been and continues every day to be a stark and sobering one for me. There is much that I did not expect, and no shortage of troubling

reports. Even unclassified reporting makes clear that America remains a primary target for Islamic terrorists. We have had substantial successes, but our enemy remains dedicated, persistent, and patient. That there has been no attack on American soil since 9/11 should not conceal a fundamental truth: we must remain vigilant in our efforts against al Qaeda.

As with other departments and agencies with national security responsibilities, much is now asked of the Department of Justice. All aspects of what we do, from budget, to allocation of resources, to policies and legislative priorities, must continue to reflect this aspect of our mission and the reality of the world in which we live.

As you well know, since the terrorist attacks of September 11, 2001, the first priority of the Justice Department has been to protect Americans from the threat of international terrorism. As the Attorney General, I plan to continue these efforts, working aggressively to investigate and prosecute terrorists while ensuring that the Department acts with scrupulous regard for the civil liberties and privacy of all Americans.

The Department has taken groundbreaking steps to pursue those who would threaten our national security. For example, in 2006, Adam Gadhan, also known as Azzam Al Amriki, was indicted on charges of treason and providing material support to terrorists for making a series of propaganda videotapes for al Qaeda – an effort that he has continued in recent weeks. We have also recently obtained convictions and guilty pleas from, among others, a former engineer with a United States Navy contractor

involved in a scheme to obtain and illegally export technical data about the United States Navy's current and future warship technology to China, and a leading manufacturer of night vision technology for illegally exporting restricted data to China, Singapore, and the United Kingdom. We also recently obtained a guilty plea from an individual who installed on a Chinese Navy site a commercial product used for military training. The Department continues to do excellent work in obtaining authorization under FISA to conduct electronic surveillance and searches related to suspected terrorists and spies.

In addition, the Department announced a significant new national security oversight and compliance effort last year. The implementation of a dedicated Oversight Section within the Department's National Security Division and the establishment of an Office of Integrity and Compliance within the Federal Bureau of Investigation involve important innovations in the way the Department conducts business. These efforts reflect a new level of internal oversight designed to ensure that our national security investigations are conducted in a manner consistent with all laws, regulations, and policies, in particular those designed to protect the civil liberties and privacy of Americans. National Security Division lawyers, working with the FBI, conducted 15 national security reviews in field offices across the country and a headquarters component since April 2007 and we plan to conduct a similar number in 2008. These reviews broadly examine the FBI's national security activities, its compliance with applicable laws, policies, and Attorney General Guidelines, and its use of various national security tools, such as National Security Letters. The reviews are not limited to areas where shortcomings already have been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

In October, the Department also launched a nationwide export enforcement initiative that includes the formation of Counter-Proliferation Task Forces across the country, the expansion of export control training for investigators and prosecutors, and the appointment of a National Export Control Coordinator. This effort is designed to leverage the counter-proliferation assets of U.S. law enforcement, export control, and intelligence agencies to combat the growing national security threat posed by illegal exports of restricted U.S. military and dual-use technology to foreign nations and terrorist organizations.

Reducing Violent Crime

Violent crime remains near historic lows in the United States, in large part because of the hard work of our State and local partners, but also through federal law enforcement and initiatives like Project Safe Neighborhoods. Under Project Safe Neighborhoods, federal prosecutors and law enforcement focus their resources on the most serious violent offenders, taking them off the streets and placing them behind bars where they cannot re-offend. Since that project's inception, the number of federal firearms prosecutions has increased significantly, and defendants earn substantial sentences in federal prison. From FY 2001 to 2007, the Department filed 68,543 cases against 83,106 federal firearms offenders – more than a 100% increase over the prior seven-year period. Project Safe Neighborhoods' deterrence and prevention efforts complement this focus on enforcement. Last year new television and radio Public Service Announcements that were developed in partnership with the Ad Council and

Mullen Agency debuted. The television announcement, entitled "Babies," demonstrates how the loss of a child to gun violence – whether to injury, death, arrest or jail time – deeply affects the family. The radio announcements similarly show the genuine pain inflicted upon real families when a family member is involved in a gun crime. Since 2001, Project Safe Neighborhoods has committed approximately $2 billion to federal, state, and local efforts to fight gun and gang violence. These funds have been used to hire more than 700 federal, state, and local prosecutors; provide nationally sponsored training for more than 33,000 task force members, hire research and community outreach support, and develop and promote effective prevention and deterrence efforts. This past year, the Department awarded over $50 million in grants among the 94 federal judicial districts in support of their Project Safe Neighborhoods programs to combat gangs and gang violence and to reduce and prevent criminal misuse of firearms.

In 2006, the Project Safe Neighborhoods program expanded to combat gangs and gang violence. The Department has taken a number of significant steps to address this problem both domestically and internationally. First, the Department established the Attorney General's Anti-Gang Coordination Committee, to bring all of the Department's wide-ranging efforts to bear in the focus on gangs. Second, each U.S. Attorney appointed an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. Third, the Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, developed and are implementing comprehensive, district-wide strategies to address the gang problems in each of America's districts. We

are working closely with our international partners, particularly in Central America, to prevent violent gangs in those regions from infiltrating our communities.

Last year, the Department announced the expansion of our "Comprehensive Anti-Gang Initiative" from six to ten sites nationwide. The initiative originally provided a total of $15 million ($2.5 million per site) to six jurisdictions experiencing significant gang problems: Los Angeles, Tampa, Cleveland, Dallas/Ft. Worth, Milwaukee, and the Eastern District of Pennsylvania's "222 Corridor", which stretches from Easton to Lancaster. Four additional sites will each receive $2.5 million in targeted grant funding: Rochester, Oklahoma City, Indianapolis, and Raleigh-Durham. Through the new anti-gang initiative, each of the ten jurisdictions incorporates prevention, enforcement, and reentry efforts to reduce and prevent gang membership and violence in their communities. Focused enforcement efforts under the Comprehensive Anti-Gang Initiative are showing strong early results. In Cleveland, one of the most violent gangs and their associates, operating in and around the target area, has been dismantled through both federal and state investigations and prosecutions. These tough actions have resulted in more than 169 federal and state indictments. Through vigorous prosecutions, 168 defendants have been convicted and one awaits trial. In Cleveland's target area, violent crime is down by more than 15 percent.

In November, in one of my first acts as Attorney General, it was my honor to personally help lead the opening of the new, joint headquarters of the Department's two national anti-gang centers: the National Gang Targeting, Enforcement & Coordination

Center (GangTECC) and the National Gang Intelligence Center (NGIC). GangTECC is the national, multi-agency, anti-gang task force created by the Department in 2006. NGIC is an inter-agency law enforcement center, staffed by analysts and created by Congress in 2005, that focuses on information sharing and collaboration in support of the goal of reducing gang membership and violence. Together GangTECC and NGIC work in a unified, national effort to help disrupt and dismantle the most significant and violent gangs in the United States. The agents are supported in this mission by prosecutors across the country in the United States Attorneys Offices and the Criminal Division's new Gang Squad created in 2006, a specialized group of federal prosecutors charged with developing and implementing strategies to target, attack and dismantle the most significant national and transnational gangs operating in the United States. Last year, in the four major GangTECC coordinated takedowns (Baltimore, MD; Dallas, TX; Gadsden, Alabama; Trenton/Newark/Jersey City, NJ), which involved agents from DEA, USMS, FBI, ATF, and ICE, more than 1,480 defendants were arrested and more than 259 of them were documented gang members.

Building on Project Safe Neighborhoods, the anti-gang program and other efforts, in May 2007, the Department launched a series of new and comprehensive initiatives designed to expand and enhance federal law enforcement efforts aimed at reducing violent crime, providing assistance to state and local law enforcement, strengthening laws, and increasing funding. Through these initiatives, the Department, working with state and local law enforcement, has identified cases that focus on the "worst of the worst" offenders. The Department has conducted coordinated fugitive sweeps and

takedowns in cities such as Cleveland, Ohio; Modesto/Bakersfield, California; Trenton/Newark/Jersey City, New Jersey; Dallas, Texas; Gadsden, Alabama; and Los Angeles, California; and conducted Fugitive Safe Surrender operations in Akron, Ohio; Nashville and Memphis, Tennessee; and Washington, DC. Further, ATF expanded its violent crime impact teams to five additional cities, and the FBI has increased the number of safe streets task forces to 182. This fall the Department also awarded, on a competitive basis, $75 million to local law enforcement task forces to target specific violent crime challenges; this is a down payment of sorts on the President's request for $200 million in FY 2009 to support task force efforts in communities that need it the most. As I speak, in Chapel Hill, North Carolina, the Department is launching the Department's comprehensive anti-gang training for state and local law enforcement and other partners from across the country. This training will focus on prevention, enforcement and prisoner re-entry strategies. Besides the Chapel Hill training, the Department will conduct eleven additional training sessions that will take place regionally throughout the United States. These are just some of our efforts to combat violent crime. Overall, we have sought to direct funding where funding could best be used, and have sought to increase our ability to pinpoint those areas.

Protecting Civil Rights

Late last year, we celebrated the 50th anniversary of the creation of the Civil Rights Division. I fully appreciate the history and legacy of this Division, as do all I have met within the Division. In the few months that I have been at the Department of Justice, I have taken a number of steps to promote the vigorous enforcement of the nation's civil

rights laws on behalf of all Americans. I met with civil rights leaders in my first month of office and spoke at Shiloh Baptist Church in Washington, DC as part of the commemoration of Reverend Dr. Martin Luther King, Jr.'s birthday. Just a few weeks ago, on January 18, 2008, as part of Operation Home Sweet Home, the Department initiated litigation against a landlord in Detroit, Michigan alleging that the landlord engaged in a pattern or practice of housing discrimination against African Americans. On January 22, 2008, Judge Stephen C. Robinson in White Plains, N.Y., ruled in the Department's favor in a voting rights case that held that the at-large system of election used by the Village of Port Chester, N.Y, to elect its trustees violates the Voting Rights Act because it discriminates against Hispanics.

Two weeks ago, on January 24, 2008, a federal grand jury indicted an individual for conspiring to threaten and intimidate African American marchers who participated in a civil rights rally in Jena, Louisiana and who were exercising a federally protected right to travel between states.

Overall, the Criminal Section of the Civil Rights Division has convicted a record number of defendants for the second year in a row, including *United States v. Seale*, where a former KKK member received three life sentences for his involvement in the brutal 1964 murder of two African-American young men in Mississippi.

Meanwhile, *The First Freedom Project*, which was launched last year, advances the Division's work in protecting against discrimination on the basis of religion through

the creation of a Department-wide Religious Liberty Task Force, a series of regional seminars, and a public education campaign. A First Freedom Seminar is being held today in Washington, D.C.

The President has made human trafficking, which is a form of modern day slavery, a priority for the Administration. A new Human Trafficking Prosecution Unit was created last year within the Criminal Section of the Civil Rights Division. The unit is staffed by the Section's most seasoned human trafficking prosecutors, who work with our partners in federal and state law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases. In the last seven years, the Civil Rights Division has increased human trafficking prosecutions by nearly 700 percent and has obtained four straight years of record high convictions. In addition, the Innocence Lost Initiative, in which the Criminal Division is deeply involved, focuses on child victims of interstate sex trafficking in the United States. Since 2003, 238 convictions have been obtained in the federal and state systems. Of those convictions, 106 were in Fiscal Year 2007.

The Disability Rights Section of the Division continues its important work under Project Civic Access – a wide-ranging initiative to ensure that people with disabilities have an equal chance to participate in civic life. To date, the Division has reached 155 agreements with 144 communities to make public programs and facilities accessible, improving the lives of more than 3 million Americans with disabilities. As we explained

in a recent letter to Congress, we support the idea of improving the Americans with Disabilities Act via legislation, though we strongly oppose the ADA Restoration Act.

In addition to supporting reauthorization of the Voting Rights Act, the Administration is currently defending the statute's constitutionality in federal court. Further, this Administration has initiated approximately 60 percent of all cases the Department has filed in its entire history under the language minority provisions of the Voting Rights Act and approximately 75 percent of all cases the Department has filed under the voter assistance provisions of the Act. Moreover, the 18 new lawsuits filed by the Voting Section of the Civil Rights Division in CY 2006 is more than twice the average number of lawsuits filed by the Division annually during the preceding 30 years. For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to help ensure ballot access, coordinating the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

The Division also has sought proactively to provide information to members of the military about their civil rights, launching a website for service members explaining their rights under the Uniformed Service Employment and Reemployment Rights Act of 1994, the Uniformed and Overseas Citizen Absentee Voting Act, and the Servicemembers Civil Relief Act.

Combating Public Corruption

Public corruption prosecutions remain a high priority for the Department. Our citizens are entitled to honest services from all public officials, regardless of their political affiliation. Our citizens are also entitled to know that their public servants are making their official decisions based upon the best interests of the citizens who elect them and pay their salaries, and not based upon the public official's own financial interests. The Department's achievements during the past year in this area show a steady commitment to fighting public corruption wherever it is found and on a non-partisan basis. The Department has devoted substantial resources to its efforts in this area. The FBI, for example, now has 639 agents dedicated to corruption matters, as compared to 358 in 2002.

The Department continues its vigorous pursuit of corruption within the Executive Branch. Recent cases have included a former Deputy Secretary of the Interior, J. Steven Griles, who obstructed a congressional investigation, to other executive branch officials, such as former Department of Health and Human Services Special Agent Scott Gompert, who stole $1.1 million.

The Department has also devoted significant attention to procurement and other corruption within the Iraq and Afghanistan war theaters and related endeavors. To date, these efforts have resulted in criminal charges against 40 individuals and two corporations for public corruption and government fraud involving government contracts valued at over $269 million. This effort includes cases against U.S. military officials,

such as Major John Rivard, who pled guilty to accepting $400,000 in bribes; Major John Cockerham, charged in August, 2007 for accepting $9.6 million in bribes; and Captain Austin Key, charged in August, 2007 for accepting $50,000 to steer contracts.

Additionally, in order to more effectively investigate and prosecute procurement fraud, the Department formed the National Procurement Fraud Task Force in October 2006. These efforts are just the latest manifestation of the Department's longstanding commitment to combating corruption both at home and abroad. The Department continues to enforce vigorously the Foreign Corrupt Practices Act (FCPA), and since 2001 the Department has substantially increased its focus and resources on enforcing this important law. In 2007, we brought 16 FCPA enforcement actions against individuals and corporations who violated the statute, including filed charges against seven individuals. These 16 enforcement actions represent a 100 percent increase over the 8 enforcement actions brought in 2006, which was itself the largest total in the FCPA's 30 year history.

Of course, public corruption is not limited by political party, or to Executive Branch officials. This Committee is well-aware of the Department's efforts to prosecute public corruption by Members of Congress and their staffs. You have my commitment that, where warranted, these investigations and prosecutions will continue without regard to politics or political affiliation.

The Department has also pursued corruption investigations at the state and local level. For example, the Department convicted three former Alaska state legislators in separate trials (the most recent occurring in November) as part of its Operation Polar Pen; two former state senators in Rhode Island have pleaded guilty as part of Operation Dollar Bill; and 16 defendants, including a state legislator, were indicted for extortion and other charges in Dallas, Texas.

In the area of election crimes, the Department continued its national educational and training programs for both prosecutors and FBI agents in the area of election law in 2007. Where willful violations of our election and campaign finance laws have occurred, the Department has brought charges.

Immigration and the Southwest Border

Enforcing the Nation's immigration laws remains an important priority for the Department. Last month, I visited the Southwest Border and met with some of the prosecutors and law enforcement officers who serve on the front lines of the effort to secure our borders. They have a tough job to do, and they are doing it well. In the last seven years we've increased the total number of prosecutors in that region by 29 percent, leading to a dramatic increase in case filings and convictions. Nationwide, we've seen more than a 43 percent increase in immigration filings between 2001 and 2007. Our U.S. Attorneys' Offices have pursued not only immigration violations, but also serious immigration-related offenses such as aggravated identity theft and passport fraud.

With the $7 million Congress recently appropriated to support our federal prosecutors on the Southwest Border we will be able to do more. We expect to use this funding to deploy up to 40 new prosecutors and 20 much-needed support staff, based upon the needs of the district. In addition, through funding provided by the Department of Homeland Security, 10 attorney positions and 10 contract support staff are being sent to the border offices in order to respond to civil litigation related to the border fence project. In total, up to 50 attorneys and 30 support positions will be deployed by December 2008.

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In addition to overseeing the Department's efforts in these and other priority areas, I have worked with the Committee on several legislative issues since my confirmation. I would like to address four of these issues today.

Ensuring That Intelligence Tools Keep Pace With Emerging Threats

First, in the area of national security, I urge you to work with me to pass long-term legislation to modernize the Foreign Intelligence Surveillance Act (FISA). S. 2248, the FISA Amendments Act of 2008, which originated in the Senate Select Committee on Intelligence, would include the authorities you provided in the Protect America Act—authorities that have allowed us to close critical intelligence gaps. And this bill contains immunity for those telecommunications companies who have been sued because they are believed to have responded to the Government's call for assistance in the aftermath of September 11. The Protect America Act is set to expire in just ten days, and it is vital

that Congress enact long-term FISA modernization legislation, with retroactive immunity, before that Act expires.

Since Congress passed the Protect America Act last year, officials from the Justice Department and the Intelligence Community have testified before Congress on many occasions about the needed authorities; we have held briefings on our implementation of the Act and oversight of our use of these authorities; and we have met with Members and staff on these issues, including providing substantial technical advice and comments on the text of the legislation. Long-term reauthorization of the Protect America Act's authorities allowing our intelligence professionals to surveil targets overseas without individual court orders is the top legislative priority of the Department of Justice.

In the Senate, this collaborative process has resulted in S. 2248, which is a strong bipartisan bill currently under consideration by that body. S. 2248 was reported out of the Senate Intelligence Committee on a strongly bipartisan 13-2 vote, and we believe it is a balanced bill that includes many sound provisions that would allow our Intelligence Community to continue obtaining the information it needs to protect the nation, while also protecting the privacy interests of Americans. The version of that bill now under consideration is a carefully crafted measure, which enjoys wide support, and we are optimistic it will lead to a bill the President can sign. I look forward to working with you and other members of the House of Representatives to achieve final passage of this important legislation.

I also want to make clear why it is our top priority. We have all seen what happens when terrorists go undetected. We must do everything possible, within the law, to prevent terrorists from translating their warped beliefs into deadly action. To stop them, we must know their intentions, and one of the best ways to do that is by intercepting their communications. Modernization of FISA is a critical part of that effort.

The Department would have grave concerns about any legislative proposal taking a short-term approach to modernizing FISA. Sunset provisions create uncertainty in the Intelligence Community regarding the rules governing critical intelligence collection practices. Intelligence professionals cannot focus on their work in protecting America from terrorist attacks while concentrating on learning new procedures and policies that may change in a few years. A sunset provision also burdens our private sector partners by requiring them to invest their limited resources in complying with a legal framework that is in constant flux. We need the help of these private partners to use these authorities effectively to keep the country safe. We should not be discouraging them from assisting us by burdening them with an ever-changing legal regime. The threat of terrorism to this country is persistent and ongoing, and we should strive for long-term institutional changes that increase our ability to meet that threat.

It is also critical that Congress provide liability protection to electronic communication service providers in enacting a reauthorization bill. First, this is the fair and just thing to do. After reviewing the relevant correspondence between the Executive

Branch and the companies that assisted with communications intelligence activities after the September 11th attacks, the Senate Select Committee on Intelligence found that these companies acted on a good faith belief that their assistance was lawful. Second, retroactive immunity serves our national security interests. As the Senate Intelligence Committee determined, "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future," resulting in a "possible reduction in intelligence" that the committee concluded is "simply unacceptable for the safety of our Nation."

The liability protection offered in S. 2248 bill is not blanket immunity, as it applies only in the limited circumstances where the Attorney General certifies to a court that the company either (1) did not provide the alleged assistance, or (2) did provide assistance between September 2001 and January 2007 with communications intelligence activities designed to detect and prevent a terrorist attack, and only after receiving a written request from a high-level Government official indicating that the activity was authorized by the President and determined to be lawful. A court must review this certification before an action may be dismissed, and the immunity does not extend to the Government, Government officials, or any criminal conduct. In short, the provision in the Intelligence Committee's bill would provide protection only in circumstances where such protection is appropriate.

A proposal that would allow lawsuits to continue by substituting the Government as a defendant in place of the telecommunications company is an unsatisfactory solution.

Even if the Government is substituted for the company in the lawsuit, the company remains vulnerable to third party discovery requests, litigation costs, and reputational harm that could deter its future cooperation with the Intelligence Community. The information that comes to light through litigation—whether certain companies provided assistance, and, if they did, what that assistance entailed—would not only hurt the companies, it would threaten national security.

I also want to address a recent proposal that offers an alternative to the Congress deciding on the issue of immunity. This proposal would grant authority to the FISA Court to decide, under a multi-part test, whether the provider's assistance was appropriate. I know that some members of this Committee have expressed an interest in this proposal, and I have spoken personally with them about it. Respectfully, I think it is the wrong approach to the problem we face. Such a proposal would simply shift likely protracted litigation on these matters to another venue, with the companies still subject to the burdens of litigation to determine how and why they assisted the Government.

Transferring those cases to the FISA Court after the Congress's extensive review of the underlying facts could be read as sending a signal that Congress doubts the actions of the companies who are believed to have assisted us—the very sort of companies the Intelligence Committee recognized that we rely on to help us protect the Nation. The new proposal could also lead companies to feel compelled to make an independent finding through their own investigation before complying with a lawful Government request for assistance that the request is lawful. That could cause dangerous delays in critical

intelligence operations and put the companies in the impossible position of making the legal determination without access to the highly classified facts that they would need to do so.

I urge Congress, and the Members of this Committee, to pass long-term legislation to modernize the Foreign Intelligence Surveillance Act and to provide retroactive immunity. We must be able to continue to collect the foreign intelligence information necessary to protect the Nation. I am confident that we can achieve this laudable goal.

Media Shield

I would also like to discuss the Department's position on proposed media shield legislation and its potential effect in the national security arena. I understand that a bill has already passed this House, but I think it critical that I explain my grave concerns with the approaches reflected both in that bill and in the version currently pending in the Senate. Having been a journalist, and having represented media entities in civil litigation, I understand the critical role that the media plays in our society. Nevertheless, the Department of Justice joins the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the Federal Bureau of Investigation, and others in strongly opposing the Free Flow of Information Act of 2007.

First, in practical effect, either bill would eliminate our ability to prosecute leaks of classified information to the media. Certainly, throughout the last several years we

have seen significant leaks of classified information that have had a detrimental impact on national security. Particularly given the threats we face, and what seems to be a constant shrinkage in our inventory of useful strategies that remain useful because they remain secret, now is not the time to give license to those who leak classified information in violation of our laws, and place at risk our military and intelligence professionals.

Second, these bills would dramatically alter the appropriate balance between the prosecution of criminals and the needs of a free press that has been the standard in the Federal courts at least since 1972 when the Supreme Court decided *Branzburg v. Hayes*. Under the current system, DOJ guidelines determine in any specific case whether it is appropriate to issue a subpoena to a reporter. These internal guidelines provide a series of standards and checklists, including my specific approval, before any reporter is subpoenaed. As a result, since 1991, the Department has authorized the issuance of fewer than two dozen subpoenas seeking source-related information—an average of less than two per year. By contrast, under the Media Shield bills, even in an investigation of a past terrorist attack, the bills would have a judge decide whether the Department's need for the information outweighs the "public interest" in the free flow of information. No standard for decision is provided in either bill. But even if one views these factors as capable of being balanced, this is not a determination that can reasonably be asked of a judge, particularly in cases involving national security.

Finally, although much of the discussion has centered on a few high-profile subpoenas to journalists, by their terms the media shield proposals have a much broader

reach. Their impact is not limited to subpoenas, but instead applies to core national security authorities, including FISA. I fear that these bills, rather than striking an appropriate balance between the interest of prosecutors and that of the press, would lead to unintended consequences, for example, impeding investigations of terrorists.

I am not alone in my concerns. Twelve key members of the Intelligence Community just sent a letter to the Senate. Each signed on because of the concerns about what this bill could do to our ability to safeguard critical information and the American people. I would urge that Members of this Committee carefully consider the concerns set forth in that letter, as well as concerns that the Department has expressed.

Whistleblower Protection Legislation

I would also like to take this opportunity to reaffirm my concern, shared by the Director of National Intelligence, the Secretary of Defense, and the Secretary of Homeland Security, concerning recent bills addressing protections afforded to whistleblowers. First and foremost, we believe that these bills authorize disclosures that threaten not only the integrity of national security programs, but also the security of the people involved in such programs. The current bills would do far more than afford whistleblowers protection; instead, these bills would have the effect of increasing inappropriate disclosure of classified information. Moreover, we believe that the current statutory protections strike the appropriate balance between protecting whistleblowers and maintaining the long-recognized duty of the Executive branch to safeguard classified information and its authority and responsibility to manage its employees.

These bills would also raise serious constitutional concerns on fundamental separation of powers principles.

We would urge Members of this Committee and this House to consider carefully the concerns set forth in the letter sent January 22, 2008, by myself and others, before sending a bill to the President.

Protecting Communities from Violent Drug Offenders

I would next like to ask Members of this Committee and the House as a whole to focus on another urgent issue: the decision of the U.S. Sentencing Commission to apply retroactively, effective March 3, 2008, a new -- and lower -- guideline sentencing range for crack cocaine trafficking offenses. Unless Congress acts by the March 3 deadline, nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for *immediate* release into communities nationwide. Overall, the Sentencing Commission estimates that retroactive application of these lower guidelines could lead to the resentencing of more than 20,000 crack cocaine offenders, any number of whom will be released early.

Retroactive application of these new lower guidelines will pose significant public safety risks; risks that will be disproportionately felt in urban communities. Many of these offenders are among the most serious and violent offenders in the federal system and their early release at a time when violent crime is rising in some communities will produce tragic, but predictable results. These individuals could very well be released without the benefit of appropriate re-entry programs, increasing the risks of recidivism

and further imperiling the safety of the communities to which they would return. Moreover, retroactive application of these penalties will be difficult for the legal system to administer given the large number of cases requiring resentencing and uncertainties as to certain key legal issues, such as the degree to which the prior sentence can be reduced. This increase would impose significant hardships on the federal judicial docket and risk delaying the timely administration of justice in both criminal and civil cases, while diverting law enforcement resources critically needed to fight violent crime. Prosecutors reasonably made their cases based on the sentences available at the time.

As a result, we think it is imperative for Congress to pass legislation to address the Sentencing Commission's decision. In calling for action, I emphasize that we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such as first-time, non-violent offenders. Instead, our objective is to address the Sentencing Commission's decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result from retroactive application of these lower guidelines. We would appreciate the opportunity to work with this Committee and this House to address the retroactivity issue in an expedient manner while beginning discussions on changes to the current statutory differential between crack and powder cocaine offenses.

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Despite disagreements we may have on any issue, I hope and expect that we will find common ground on many other matters of great importance to this Committee and to

the country—including, most importantly, our shared belief in the mission of the Department of Justice and the great work of its employees.

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today, and I look forward to working with you to advance the priorities and mission of the Department of Justice.

Mr. CONYERS. Thank you very much, Mr. Attorney General.

Let me ask you, have you any additional comments to make about the issue of waterboarding now that the CIA director has confirmed that that has, in effect, happened in—under our government?

Mr. MUKASEY. If you wish to address a question to that, I am happy to answer a question. I could simply talk and then risk not answering the question that you had in mind. So if you wish to pose a particular question, fine. I am prepared to answer particular questions relating to that.

Mr. CONYERS. Well, are you ready to start a criminal investigation into whether this confirmed use of waterboarding by United States agents was illegal?

Mr. MUKASEY. That is a direct question, and I will give a direct answer.

No, I am not, for this reason: Whatever was done as part of a CIA program at the time that it was done was the subject of a Department of Justice opinion through the Office of Legal Counsel and was found to be permissible under the law as it existed then.

For me to use the occasion of the disclosure that that technique was once part of the CIA program—an authorized part of the CIA program, would be for me to tell anybody who relied, justifiably, on a Justice Department opinion that not only may they no longer rely on that Justice Department opinion, but that they will now be subject to criminal investigation for having done so.

That would put in question not only that opinion, but also any other opinion from the Justice Department.

Essentially, it would tell people: "You rely on a Justice Department opinion as part of a program, then you will be subject to criminal investigation when, as and if the tenure of the person who wrote the opinion changes or, indeed, the political winds change." And that is not something that I think would be appropriate and it is not something I will do.

Mr. CONYERS. Are you prepared to let us get a copy of the Office of Legal Counsel opinion?

Mr. MUKASEY. The Office of Legal Counsel opinion discusses particular techniques that were part of what remains a classified program.

We have, I believe, provided an unclassified discussion of general legal principles—did it back in 2004. And we have provided some classified briefings with regard to the legal reasoning underlying opinions, and are prepared to continue to do so.

But the opinions themselves can't simply be turned over because they discuss not simply legal reasoning, but the program itself, which remains classified.

Mr. CONYERS. Well, every Member of this Committee is cleared for top secret information.

Mr. MUKASEY. The opinions themselves dealt with a program that—to the extent the opinions themselves deal with a current—opinions relating to a past program cannot simply be disclosed in that fashion. They can be the subject of briefings, and have been. We can't simply turn them over.

Mr. CONYERS. Well, can we meet and find out what it is you are basing the response to my question?

Mr. MUKASEY. I think the question was whether I was going to open a criminal investigation because it has now been disclosed that waterboarding was part of the program.

And what I have said is that waterboarding, because it was authorized to be part of the program, pursuant to approach—that it was authorized to be part of the CIA program, cannot possibly be the subject of a criminal—a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice. That won't change whether letters are disclosed or not disclosed.

Mr. CONYERS. Well, what we are trying to do is make ourselves conversant with the basis of the response that you gave to my question. So there must be some way, between the Department of Justice and the House Committee, that we can be made more aware—we have requested this document before—of the document on which you base your response.

Mr. MUKASEY. The response about a criminal investigation doesn't really depend on the particular content of the document. It depends on there having been an opinion that defined and authorized the limits of a particular program that is now disclosed included waterboarding at that time. It is no longer part of the program; that has also been disclosed, but that doesn't change the contents of the letter.

That said, I am sure that we can talk about possible additional discussion of what is in the letters between the department and Members of this Committee. My understanding is there had been ongoing discussion with Members of various Committees, including particularly the Intelligence Committees, but I was not aware—there may well very well have been discussions with Members of the Committee. I am not certain as I sit here.

Mr. CONYERS. Well, we will pretend that we have never asked for this before, and we will start right now.

Thank you very much.

We have a call for votes. The Committee will stand in recess until this one—four votes are dispensed with.

[Recess.]

Mr. CONYERS. The Committee will come to order.

And the Chair recognizes its Ranking Member, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

General Mukasey, I would like to try to cover three subjects, if we could; interrogation techniques, FISA and, if we have time, intellectual property rights enforcement.

In regard to interrogation techniques—and I know you are going to be asked a lot of questions about that today—I just want to express the personal opinion that I hope the Administration will not be defensive about using some admittedly harsh but nonlethal interrogation techniques, even techniques that might lead someone to believe they are being drowned even if they are not.

My guess is that 99 percent of the American people, if asked whether they would endorse such interrogation techniques to be conducted on a known terrorist with the expectation that information that might be derived from such interrogation would save the

lives of thousands of Americans, that 99 percent of the American people would support such interrogation techniques.

And I just can't imagine that we would consider not using them, if they, in fact, were going to lead to the saving of thousands of American lives.

Now, that is not a question, it is a statement. But I would welcome any comment on it that you might have.

Mr. MUKASEY. I will thank you for the comment.

I will say, as I said to the Chairman, if there is a particular question you want to pose, I will be happy to answer it. I thought the comment may very well not answer the question you have in mind.

Mr. SMITH. Okay.

Would you agree with me that 99 percent of the American people would probably endorse such techniques if they could be shown to save thousands of American lives and, again, to be conducted only on a known terrorist with the high expectation that such information could protect the American people?

Mr. MUKASEY. Regrettably, unlike the—unlike the question posed by the Chairman, I can't sit here and say what I think 99 percent of people would do. I have, kind of, an instinct, but——

Mr. SMITH. I can, but you cannot. I understand that.

General Mukasey, let me read a sentence from a *New York Times* editorial that appeared January 31 and ask you to respond to some of the assertions that were made in this particular editorial.

This is the sentence; "Mr. Mukasey also pushed Congress to give immunity to telecommunications companies for any illegal acts they committed by helping the Administration carry out——"

Mr. MUKASEY. I am sorry, "for any illegal acts they committed"?

Mr. SMITH. That is correct—"while helping the Administration carry out its outlaw domestic spying program." Kind of an amazing assertion.

But the question is this: Are you pushing, have you pushed Congress to give immunity to telecommunications companies for any illegal acts they committed?

Mr. MUKASEY. No.

Mr. SMITH. Do you know of any aspect of the domestic spying program that is illegal as is asserted in this editorial?

Mr. MUKASEY. No, I do not.

Mr. SMITH. Okay. Thank you.

To go on about FISA, as you know, several bills have been introduced to reauthorize the Foreign Intelligence Surveillance Act. One bill is called the Restore Act. Do you have any concerns about the Restore Act? And if so, what are those concerns?

Mr. MUKASEY. I have concerns about the Restore Act that I tried to cover to a certain extent in my opening statement, which include that it does not include immunity for telecoms who participated on the assurance that what they were doing was necessary and lawful, which poses tremendous dangers for the future, as I outlined.

It does not permit us to gather intelligence in categories that we are permitted and should be permitted to gather.

It has a sunset provision that would stifle the investment of effort both the investment by—in personnel and the investment in material in an ongoing program.

For all of those reasons, we have problems with it.

Mr. SMITH. Okay. Understand. Appreciate that.

General Mukasey, last question has to do with intellectual property rights enforcement.

As you know, the department has assigned a prosecutor in each of the Federal judicial districts to enforce intellectual property rights. It looks like there has been very uneven enforcement: Over half of the judicial districts in the United States, in fact, have only brought zero or one action against violators or those who have violated our intellectual property rights.

Is there any more that the department can do to try to enforce the intellectual property rights?

Mr. MUKASEY. There is always more that the department can do. And enforcement of intellectual property rights engages not only property rights themselves, but also matters relating to the security of the country insofar as those rights involve technical processes and procedures that we rely on for communications.

Mr. SMITH. Any reason half the districts in the United States would not be showing particular activity when it comes to prosecuting those kinds of violations?

Mr. MUKASEY. Not that I can think of offhand.

When I was a district judge, we had all manner of intellectual property cases, ranging from knock-offs of popular products to——

Mr. SMITH. In those districts that are not active, perhaps you can enforce them to be more active.

Mr. MUKASEY. Perhaps we can make them aware of the need to be active and to go out and make cases. And I appreciate——

Mr. SMITH. Thank you, General Mukasey.

Thank you, Mr. Chairman.

Mr. CONYERS. You are welcome.

The Chair recognizes the Chairman of the Intellectual Property Subcommittee, Howard Berman of California.

Mr. BERMAN. Thank you, Mr. Chairman.

And welcome, General Mukasey.

The Ranking Member's question to you left something hanging, which I just wanted to clarify. I think the answer is pretty clear.

Wouldn't you say that it is true that there are "harsh interrogation techniques" that are not lethal which are still illegal because they fit within the definition of torture? A technique does not have to be lethal to be torture.

Mr. MUKASEY. I think that is fair to say, as a general matter, because the torture statute is phrased in general terms.

Mr. BERMAN. And when that is so, whether 99 percent of the American people have an opinion about that particular technique is somewhat irrelevant to the issue of whether that conduct should be permitted.

Mr. MUKASEY. I think it is fair to say that the law doesn't turn on what any percentage of people think is included within it or not within it, it is what it includes or doesn't include——

Mr. BERMAN. That is right.

Mr. MUKASEY [continuing]. On a reasonable reading. I am with you on that.

Mr. BERMAN. I would like to go to another subject.

You have stated, I believe several times, both in your confirmation process and since, of your desire for cooperation between the Justice Department and the Congress.

My question is, does that cooperation apply to jointly developing mutually agreeable procedures to govern any future search warrants executed on congressional offices in such a way as to protect legitimate law enforcement needs, while also respecting the speech or debate clause of the Constitution and the separation of powers?

Mr. MUKASEY. I think I can say it emphatically includes that. Because I believe there are ongoing discussions to resolve precisely that. There is a case that was brought, as you know. We petitioned for cert, I believe. We would much prefer to resolve that case in the way that most disputes with respect to privilege and other matters are resolved between Congress and the Justice Department, namely by conversation and accommodation.

And, as I understand it, that is actively under way.

Mr. BERMAN. You are right, I believe and—that this is part of a recent meeting between the House Office of General Counsel and the Justice Department.

I guess, are you saying that the Justice Department is actively engaged and committed to working to develop such a mutually agreeable process?

Mr. MUKASEY. Both of those.

And I deeply hope that it comes out that way, rather than in some bright-line ruling that one of us can't live with or would find it awkward to live with.

Mr. BERMAN. Great.

And then, finally, if there is such an agreement, would you support setting forth that agreement in a memorandum of understanding or legislation or in some other fashion?

Mr. MUKASEY. I think precisely how that—what the terms of the agreement are will govern, to a certain extent, how it is to be set forth.

I am, at this point, more concerned that we reach agreement. Once we reach agreement, I think we can figure out precisely how to set it forth, whether it has to be in a memorandum of understanding or in some other fashion.

But I certainly favor the success of the conversations that I understand to be now ongoing.

Mr. BERMAN. Well, thank you. I think you have covered that subject. And I appreciate your responses.

Since my time isn't quite out, let me go back to the—just the questions of Chairman Conyers and you.

I understand the notion of conduct done pursuant to a Justice Department authorization. I am curious about whether you think that the analysis that went behind that authorization was correct.

Mr. MUKASEY. If we are talking about the authorization with respect to waterboarding, what I undertook to review was the current program. The current program, as I disclosed, does not include waterboarding.

Were waterboarding to be brought back into the program, what would have to happen is that would have to come initially from the Director of the Central Intelligence Agency and, I believe, the Director of National Intelligence to the Justice Department. And I

would have to analyze that question not only pursuant to the law that existed at the time of the prior opinion, but also with regard to the laws that have been passed since, which have changed the landscape, I think it is fair to say, rather substantially.

Mr. BERMAN. So it is sort of an internal case or controversy test?

Mr. MUKASEY. Sort of. Yes.

Mr. BERMAN. Okay.

Mr. MUKASEY. Based on the concrete facts that would be presented to us at the time.

Mr. BERMAN. Thank you.

Thank you, Mr. Chairman.

Mr. CONYERS. The Chair recognizes the Chairman emeritus of the Committee, Jim Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I want to get back to the issue of severe interrogation practices.

And at the September 26 Democratic presidential debate, the moderator, Tim Russert, posed the following question: "Imagine the following scenario. We get lucky. We get number three guy in Al Qaida. We know there is a big bomb going off in America in 3 days and we know this guy knows where it is. Don't we have the right and responsibility to beat it out of him?"

Barack Obama responded by saying: "There are going to be all sorts of hypotheticals in emergency situations, and I will make that judgment at the time."

Now, I hate to put you in a position of choosing between our distinguished Chairman and Senator Obama, but do you agree with Senator Obama that if he became President he should be able to make that judgment at that time, or do you disagree with him and think that Congress should make that decision right now for all time?

Mr. MUKASEY. The only thing I can say is the way in which techniques could be authorized.

If "beating it out of him" is part of the program, then it could be done. I am not saying that it is or that it isn't.

If it is not part of the program, the only way it becomes part of the program is if it comes from the CIA Director and the Director of National Intelligence, to me, to the President, and a ruling that it does not violate any statutes.

Mr. SENSENBRENNER. I guess what I am saying is, is apparently Senator Obama's answer implies that he is defending presidential powers against being hamstrung by an inflexible law passed by Congress. And, you know, that appears to be the thrust of Senator Obama's answer, is that he said if he became President he doesn't want to have handcuffs put on him.

Mr. MUKASEY. If Congress passes a statute that treats a particular subject that Congress can and it becomes law, then that is the law, and the President will be bound to obey it.

As a practical matter, to entertain the view that the President could then order somebody to act outside it I think is not a practical view.

Mr. SENSENBRENNER. Okay.

I also want to talk about one of the other urgent iteMs. And that is the retroactive reduction in the sentencing guidelines for crack dealers.

Does the Justice Department have any statistics about the 1,600 that would be immediately released, what communities they were dealing crack in prior to their arrest and conviction?

Mr. MUKASEY. I believe we can—although I haven't in front of me and I certainly haven't committed to memory the precise communities in which they would be located, I believe we can make distinctions based on their criminal histories, which would give some clue; based on whether any of them got a two-point uptick in the offense level, which would indicate the presence of a gun; and whether any of them got—had any prior history of gun convictions, regardless of their criminal history.

It is my understanding that if all of those factors are included—that is, a criminal history category of two or above, a possible uptick of two for the presence of the gun or a prior gun conviction—any of those, that that would exclude from consideration for retroactive application something like, I think, 60 or 70 percent of the 1,600.

I believe that we have statistics to show that.

Mr. SENSENBRENNER. Yes.

You know, my gut reaction is that, if these people are released from prison, it will go right back into the communities where they were trafficking crack, and perhaps go right back into business, or definitely be involved in other criminal activity, particularly when being in possession of a firearm, which, of course, is a felony in and of itself.

Mr. MUKASEY. And an additional problem is they would go back rapidly, without the pre-release programs that we have to try to reintroduce people into the community in a way that mitigates the possibility that they might become recidivists.

Mr. SENSENBRENNER. Thank you.

Mr. CONYERS. The Chairman of the Constitution Subcommittee, Jerry Nadler of New York?

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Attorney General, I was interested to hear you say a moment ago that if the President ordered someone to do something against the clear intent of Congress, that is outside the law.

The FISA act said a person is guilty of an offense if he intentionally, one, engages in electronic surveillance under the color of law, except as authorized by statute.

Now, the President admitted that he did that. Every 45 days he signed an authorization to direct the surveillance of people in the United States without a warrant, as required by the FISA act.

Now, I had previously asked your predecessor, Attorney General Gonzales, given this apparent prima facie case that the President and people under him, including the prior Attorney General, engaged in felonious conduct by doing so, that he appoint a special counsel to investigate the warrantless surveillance of Americans.

And I recently reiterated that request to you.

Now in your testimony before the Senate last week, you responded to Senator Leahy's questions on whether the President violated the law by authorizing wireless surveillance by stating that you "don't know whether the President acted in violation of statutes," including FISA.

I believe we need to know the answer: Did the President, with, as has been reported, the advice of the Justice Department, break the law?

I believe the answer is clear that he did.

Given the extraordinary circumstances involved, allegations of criminal conduct by the President and other high-ranking officials and the possibility of conflict at the Justice Department, will you now agree to appoint outside special counsel so that we finally will get an answer to this question?

Mr. MUKASEY. The direct answer to your question is no, I will not.

Mr. NADLER. Because?

Mr. MUKASEY. Beg pardon?

Mr. NADLER. Because?

Mr. MUKASEY. Because there is one detail that was omitted, and it may very well have been my fault in saying I didn't know when I had forgotten or overlooked.

There was in place an order—I am sorry, an opinion of the Justice Department describing the legal basis for the program to which you refer. That included the authorization of the use of military force, as a congressional statute on which it was relied that that behavior was legal.

I understand that there are views on both sides of that—strong ones.

Mr. NADLER. Well, there are views—let us put it this way: The Supreme Court in the Hamdan case, in a case just about directly on point, ruled that—for reasons I am not going to get into now, we don't have time in 5 minutes—that the use of the two excuses by the Justice Department, namely the President's inherent powers under Article II and the authorization for the use of military force as justification, was not, in fact, justification. The President is still bound by the law. The law was not repealed by implication by the AUMF and that that is not sufficient.

Now, the Justice Department, in a letter to congressman—to congressman, excuse me—to Senator Schumer recited these letters as a refutation by a host of constitutional scholars against that.

My second question, then, when this is—on behalf of the Justice Department, in effect representing the President, although a step removed, you say that this is justified, that it is not illegal, for the reasons stated.

Lots of other people say it is clearly illegal.

Normally, we would have that settled in a court. A court would decided whether something is legal or not when there is a dispute.

But when you attempt to get this into court—you can't get it into court by prosecution, because you are not going to prosecute or appoint the special counsel. But when you attempt to get it into court by victims or alleged victims, plaintiffs suing in civil court, then the government comes out and says, "Oh, you can't get into court alleging violation of your rights through violation of FISA because of the state secrets privilege."

So now you have set up a situation where the President and the Attorney General assert the President's right to do something which seems to a lot of people to a lot of people to be a violation of law and there is no way of checking that.

In other words, there is no way of getting—well, let me ask you a different question. Under this, is there any way—and would you agree that the state secrets privilege has to yield, because otherwise there is no way for Congress or the courts or anybody to have any check on the President's claimed power?

Mr. MUKASEY. The state secrets privilege—just to answer the last question first—the state secrets privilege is invoked by the government and backup is provided for its invocation.

To my knowledge, that backup has been sustained——

Mr. NADLER. Well, the state secrets privilege has often been used where there is no backup provided, simply an affidavit.

Would you agree that where the state asserts state privilege—state secrets, that the court ought to be provided with information in order to rule on the validity of the state secrets privilege?

Mr. MUKASEY. The court can be provided with and is provided with information relating to the invocation of the state secrets privilege and an explanation of the basis for it, and to rule on that basis.

Mr. NADLER. But the court often rules with—simply on an affidavit without seeing the documents to judge for itself whether they deserve—whether they would threaten national security were they revealed.

Would you agree that the court ought to see that and make that decision?

Mr. MUKASEY. I believe that courts see affidavits in some cases, affidavits and documents in others, and have what they consider to be an ample basis because they rule on that basis for a ruling. Sometimes things are quite clear.

Mr. NADLER. And sometimes they are not.

Mr. MUKASEY. And sometimes they are not.

Mr. NADLER. And, lastly, we have heard hearings in this Committee on rendition—on so-called extraordinary rendition. On the Maher Arar case we are going to hold further hearings.

Would you—and we have been told that we got assurances from Syria that Mr. Arar would not be tortured when he was sent there, which of course proved not to be true.

Would you commit or agree that upon request, which will be forthcoming, that you will send someone from the department for a hearing here to answer the questions, "Who obtained these assurances? From whom were they obtained? What assurances were given?" so that we can begin to get to the bottom of this rather horrendous case?

Mr. MUKASEY. It is my understanding that some of this has been the subject of classified briefings to various Members of this Committee and other Committees.

It is also my understanding—and this is based on an exchange of notes between us and Canada that became public, not because of anything that anybody wanted to do voluntarily—that Mr. Arar is still on the no-fly list.

Mr. NADLER. Yes, he is; improperly so, in my opinion.

Mr. MUKASEY. Beg pardon?

Mr. NADLER. I have seen——

Mr. CONYERS. The gentleman's time may have expired.

Mr. NADLER. Let me just say, I have seen the confidential documents. He shouldn't be on the no-fly list. But we have not heard about the assurances from Syria, even on a classified basis. We need to know that.

I thank you, Mr. Chairman.

Mr. CONYERS. Thank you.

Howard Coble, Ranking Member, of North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

General, good to have you on the Hill today.

I want to associate myself with comments made by the distinguished Ranking Member regarding intellectual property crimes in which he noted that more than half of the judicial districts in the country have shown little or no interest in prosecuting these.

General, it is my belief that these intellectual property crimes should hold a national priority. Do you all at the Justice Department share that view with me?

Mr. MUKASEY. We do, and we practice it. We approach on a national basis the need to protect intellectual property, which is the foundation of this economy and also goes directly to national security concerns.

Mr. COBLE. I am glad to hear that, because I concur with you.

Subprime mortgage questions: It has been reported that the FBI is in the process of investigating 14 companies involved in either mortgage lending to borrowers with weak or questionable credit or the marketing of securities backed by those loans.

Considering the magnitude of this crisis—and I think it is a crisis—and the breadth of these allegations, would any resulting prosecutions be a priority for the Justice Department?

Mr. MUKASEY. I can't comment on what the FBI may or may not be investigating.

But I recognize the degree to which the subprime debacle has affected the economy. And therefore, if crimes are disclosed, they would certainly be a priority.

Mr. COBLE. Well, let me put an alternative question to you, General.

Do you feel that prosecuting illegal predatory lending is an effective method of addressing the subprime mortgage crisis, as opposed to other proposals that would perhaps lend the bankruptcy code to, on the one hand, help consumers, but do little to stop the potentially illegal lending practices?

Mr. MUKASEY. I can't comment on a comparison between the two.

But I know that, generally, prosecuting cases where you have an informed audience of other people who may be similarly situated to the defendant can be a very effective way of preventing further violations. And that is an informed audience.

Mr. COBLE. Retain your prosecutorial hat, and let me put this question to you, General.

What are you all at Justice doing to maximize the combined efforts of the various Department of Justice components to combating our Nation's gang problems, A?

And B, are you taking steps to combat gangs which are more organized than neighborhood-based gangs that generally operate regionally and nationally, across the country?

Mr. MUKASEY. Definitely.

We have a facility, newly created, devoted to the gathering and dissemination of information about gangs, both national and international, gangs like M.S. 13 that cross not only state boundaries but national boundaries.

We are working with the Bureau of Prisons to identify people within prisons—we are working not only internally but with people on the outside—who promote gang activity, and are trying to adopt a coordinated response to that kind of activity.

Mr. COBLE. I appreciate knowing that. I was going to mention M.S. 13 as well, but you beat me to it.

You have pretty well addressed the retroactivity question surrounding the crack cocaine issue. And I think that has been thoroughly discussed.

And, Mr. Chairman, I hope that you will note, I was going to yield back my time before the red light illuminates, but I see the Ranking Member wants me to yield to him.

Mr. SMITH. Would the gentleman from North Carolina yield?

Mr. COBLE. I will, indeed.

Mr. SMITH. Thank you very much.

I wanted to follow up on a subject just mentioned by Mr. Coble.

And, General Mukasey, this is something you touched upon a while ago, and it goes to the sentencing guidelines.

I am just curious. Is there a way for the department to track those individuals who are released early? And will you be able to give a report to us as to what additional crimes those individuals have committed? Is that something that is possible, and can you get us that information?

Mr. MUKASEY. "Impossible" is one of those words that I try to avoid.

But I have to tell you that if a large number of individuals are released, it is going to tax the resources of the probation department, which has to supervise and keep track of those people, which is already——

Mr. SMITH. So the information is obtainable, it is just a matter of time and priority?

Mr. MUKASEY. Correct, but it is going to be difficult. Going to be difficult. We will try to do it.

I hope we are not placed in that position, because once March 3 arrives, there is no undoing that. It is not as if we can turn the clock back.

In fact, one judge has already released——

Mr. SMITH. Well, I think it would be important for us to know and for the American people to know if, in fact, individuals who are released early are committing additional crimes.

And there may be a way for you to do a pilot test or test a geographical location if you cannot do the entire number of individuals released early.

Mr. MUKASEY. We will try. I hope we don't have to try.

Mr. COBLE. I will reclaim.

Mr. SMITH. Thank you.

Mr. COBLE. Mr. Chairman, do I get credit for yielding before the red light, but for having yielded to the Ranking Member?

Mr. CONYERS. Only minimally.

Mr. COBLE. I appreciate that.

Mr. SMITH. I yield back.

Mr. CONYERS. Chairman Bobby Scott of the Crime Committee?

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

General Mukasey, just briefly on the issue of torture, let me just make sure I have got this right.

Is it the Department of Justice's position that if Administration officials think that a person has important information, in their opinion, the torture is legal, and that decision is not subject to any judicial review or congressional restraint?

Mr. MUKASEY. No.

Mr. SCOTT. Then where is the review or restraint if Administration officials decide to torture somebody?

Mr. MUKASEY. The torture statute applies across the board. There is an existing CIA program that has been found not to violate that statute or any other applicable statute. That is the only program that is now authorized.

Mr. SCOTT. So if it is, in fact, torture in violation of the criminal code, the fact that some Administration officials want to do it anyway—just because they want to do it, they can't immunize themselves from the criminal sanctions?

Mr. MUKASEY. That is correct.

Mr. SCOTT. Okay.

On the issue of human trafficking——

Mr. MUKASEY. I should add, I can't——

Mr. SCOTT. Okay, well, in the issue of human trafficking, the department can always prosecute any human trafficking case in which it can prove force, fraud or coercion. It is often difficult to get victims of sex trafficking to testify. And there is legislation that has passed the House 405-2 which is aimed at strengthening the department's ability to go after traffickers who benefit from commercial transactions.

Can we get your support for the bill which would allow the prosecution, notwithstanding the fact that you—without having to prove force, fraud or coercion?

Mr. MUKASEY. We focus our activities on the worst of the worst. And we prosecute trafficking cases, we prosecute child cases that arise from Internet victimization, we prosecute a broad range of cases through a unit devoted specifically to that effort.

The jurisdictional device you indicated of affecting interstate commerce doesn't really raise the bar measurably, because that is a—in my experience as a Federal judge, that is a fairly low bar to meet, and would have the effect of dispersing efforts that we need to focus on the most horrendous cases.

Mr. SCOTT. And if in a horrendous case the victims are unwilling to testify as to force, fraud or coercion, then you would not support legislation that would make it a little bit easier to prosecute?

Mr. MUKASEY. I would be reluctant to support legislation that would have the effect of dispersing resources that are focused on cases that if you saw examples of them would mortify you.

I spent part of the day visiting the National Center for Missing and Exploited Children out in Alexandria. It is a life-changing experience. That is the kind of case that we prosecute. We cooperate with those people. We have law enforcement people on the scene there.

Mr. SCOTT. The Department of Justice doesn't prosecute every case that is technically within its jurisdiction. You use discretion. And we would assume that even if we changed it you would still use the discretion.

But let me go into another issues—back to the crack powder/cocaine disparity. What portion of the defendants who might benefit from the legislation—what portion of those are violent and what portion of those are girlfriends just caught up with the situation with their boyfriends and they are serving decades, more than bank robbers and murderers? What portion of them would your classify as violent criminals?

Mr. MUKASEY. I think the statistic of which I am aware, namely that a criminal history category of two or above, which indicates some problem. The presence of—a two-point uptick for presence of a gun, which, again, indicates a problem. A prior gun conviction of any kind would encompass something like 60 or 70 percent of that first——

Mr. SCOTT [continuing]. An opportunity to check that figure, because——

Mr. MUKASEY. I will.

Mr. SCOTT [continuing]. We are given a different number.

Let me ask you one quick question. In terms of discrimination, if there is a prohibition against discrimination for Federal contractors, are there any circumstances when it would be okay for a Federal contractor to tell someone that they should not be able to get a job solely because of their religion in a Federal contract?

Mr. MUKASEY. As you describe it, there shouldn't be.

The question is whether there is legislation that addresses that in a way that then doesn't require a court to make a distinction that it isn't really equipped to make as between what is or isn't a religious affiliation or what is or isn't a religion, or to——

Mr. SCOTT. Sir, we have discrimination laws on the books. Should it be legal for somebody to say, with Federal money, "You can't get a job solely because of your religion"?

Mr. MUKASEY. It should not.

Mr. SCOTT. Thank you.

Thank you, Mr. Chairman.

Mr. CONYERS. The gentleman from Ohio, Steve Chabot?

Mr. CHABOT. Thank you, Mr. Chairman.

First of all, Mr. Attorney General, let me commend you for taking the time to go to the Center for Missing and Exploited Children. I have toured there as well, and I agree with you that it can be a life-altering experience. And I would encourage as many colleagues to go there and see the good work that they do and the horrors that are out there, especially on the Internet, for many children nowadays.

So, thank you for doing that.

My first question: As you probably know, there is a great deal of speculation that Delta Airlines may announce a merger with another carrier. And I have a considerable interest in this because in the greater Cincinnati area we have the second-largest Delta hub in the Nation, only second to Atlanta.

Mergers within the airline industry are treated with great speculation because of the impact that such a move has on consumers in terms of numbers of flights and airfares.

And, in addition to the economic toll that could occur to the city or the community when one of these mergers occurs, there could be either businesses attracted to a community or away from it, there can be considerable loss of jobs and a number of things can happen.

My question is, how will the Justice Department treat such intents to merge? And what factors will the Justice Department examine?

For example, will the department look at such things as loss of—to a particular region about impact on consumers, job loss and those types of things, as part of the review?

Mr. MUKASEY. I have met with the Antitrust Division. And they examine every proposed merger that can have an anti-competitive effect. And it is my understanding that they employ a full-time economist who considers a broad range of issues.

I can't, as I sit here, regrettably, tick off each of the issues. I didn't take economics, and I wouldn't presume even if I had.

But they consider a broad range of issues. And they consider the anti-competitive effect of any merger under the laws as they exist.

Mr. CHABOT. Thank you.

And my other question, General: As you are well aware, the Nation is still trying to fully understand the events that led to the subprime lending crisis and respond to the fallout, which includes homeowners falling victim to foreclosure.

For example, Howard Coble, our colleague here, mentioned this in a question that he had. I come from a little different angle.

The state of Ohio ranks six in the number of homes that have been the subject of foreclosure, with one in every 58 homes being foreclosed upon.

The city of Cincinnati, the city that I happen to represent, witnessed an increase in the number of foreclosures in 2007, placing it 30th on the list around the Nation in the numbers of foreclosures that have occurred; the problem that we are dealing with.

A primary reason for the foreclosure fallout are predatory lending, lax lending—those are some of the main things. And many of these were in place up until 2006.

My question is what is the Department of Justice doing to investigate and prosecute those institutions that are directly utilized or endorsed the use of predatory practices?

And I know that many state prosecutors are under way, including in Ohio. What can the Justice Department do to support these state efforts?

Mr. MUKASEY. I think what we need to do and I think what is being done is a gathering of facts and then a measuring of those facts against existing Federal legislation to see whether there are prosecutions that need to be brought.

If the conclusion is drawn that there is something that prevents that, then, obviously, we need to consult with Congress to get legislation on the books. But the first thing we need to do is gather facts.

Now, I heard in one of the other questions that there are reports that the FBI is doing that.

Mr. CHABOT. Thank you.

And, finally, before my time runs out, I believe that in response to the second part of Mr. Coble's question that you stated that you don't have an opinion, either pro or con, relative to the efficacy of allowing bankruptcy courts to modify the mortgages of those who are in foreclosure due to various predatory practices. Is that correct?

Mr. MUKASEY. It is not a question of my not having an opinion. It is a question of whether it is appropriate for the Attorney General to sit and start expressing opinions on policy questions rather than sticking to what he has sworn to do, which is to enforce and obey the law.

Mr. CHABOT. Thank you.

Mr. MUKASEY. So I am just trying to take myself out of it on that basis.

Mr. CHABOT. Okay. Thank you.

We encourage you to stay out of it, too. [Laughter.]

Mr. CONYERS. Members of the Committee, we will now take a 10-minute recess at the request of the Attorney General and return immediately after the 10 minutes.

Thank you very much for your cooperation.

[Recess.]

[Off Mic.]

Mr. MUKASEY [continuing]. We had what I think could be called—what I think the diplomats called a frank exchange of views with the Office of Management and Budget that resulted in the budget that we have.

That said, what we are trying to do is to focus our efforts and our glance in a coherent way so that we fight the problems that we have to fight on an across-the-board basis without particularly focusing on this program or that program.

Mr. WATT. Well, even if you did that, though, Mr. Attorney General, if my math is right, $400 million into $1.7 billion is about three or four times. You can't reorganize programs enough to make up $1.3 billion, can you?

Mr. MUKASEY. We can't create money out of the air, obviously not. What we can do, though, for example, with respect to gangs insofar as that might impact on the COPS program, we have a center that is going to disseminate information, with respect to gangs, to localities where the gangs are functioning.

Mr. WATT. Yes, I understand that you are going to try to be more efficient. I am just—unless you are telling me that there is $1.3 billion worth of inefficiency in the Department of Justice at this point, I don't know how you make up a $1.3 billion differential, what you are doing now for $1.7 billion you are going to do for $400 million.

Mr. MUKASEY. I think we are going to do our best, and we are going to do what appears to make sense, which is to focus our efforts in an across-the-board way rather than focusing on whether this grant program or that grant program is in existence. I think we can function effectively.

Mr. WATT. On $404 million, the Department of Justice can function effectively?

Mr. MUKASEY. We can make good use of any funds that we get—no doubt about that.

Mr. WATT. All right. I am just—I know it is touchy to be out of step with the President, even if he is not going to be here when his budget he proposed goes into effect, so I am—I mean, I understand what you are saying, but that seems to me to be a pretty draconian cut that is being proposed.

And I appreciate your walking the line on—— [Laughter.]

Mr. CONYERS. The gentleman's time has expired.

Mr. WATT [continuing]. And I understand you can't criticize the President publicly on this, so that is fine.

Mr. CONYERS. The Chair recognizes its only ex-attorney general, Dan Lungren.

Mr. LUNGREN. Thank you very much, my only Chairman of the Judiciary Committee at the present time.

Mr. Attorney General, welcome to the world of politics. This is the only place where, when the President introduces a $3.1 or $3.2 trillion budget, the largest in the history of the world, the only thing you hear about is why he didn't spend more.

I just came back from my district, had a couple of town halls, and people were talking about excessive spending.

And I would use, as an example, the COPS program, where it was sold by the Clinton administration as seed money that would last for 5 years, that you would use the money and we would pay 100 percent the first year, 75 percent the second year, 50 percent the third year, 25 percent the fourth year. And in the fifth year, local and state governments would be on their own.

But now we are told, if we don't extend the program, you, Mr. Attorney General, working for the President, are bleeding local government from their justified money. So, again, welcome to the world of politics.

Let me thank you for your decision, in rejecting calls to appoint a special prosecutor on the destruction of CIA interrogation tapes case, not that you aren't looking at it but that you believe that the department has the integrity to go through that investigation by appointing a trusted assistant U.S. attorney.

I am one of those who fears that we have depreciated the value of the Justice Department, over the years, by immediately moving toward special prosecutors, presuming that the Justice Department can't do the job.

And so, I thank you for doing a professional job in your decision-making on that.

Mr. Attorney General, I would like to ask you something in the area of FISA, because some questions were posed to you.

Do you agree or disagree with the statement of your predecessor, Mr. Griffin Bell, in 1978, when, in appearing before the United States Senate in support of the creation of the FISA act, on behalf of the Clinton administration—excuse me, the Carter administration—he said that nothing in that act could intrude on the President's inherent policy under commander-in-chief powers to conduct foreign intelligence?

Mr. MUKASEY. I think I have already said, in fact I think I said in my—in the hearings on my confirmation, I pointed out that statement.

But we are now in a world in which we are functioning under a statute that we think works and that we want to have made permanent and put in place long term. And that is where we are, and that is where we want to be.

Mr. LUNGREN. But can the Congress inhibit the President by statute where he has inherent constitutional power?

Mr. MUKASEY. Again, I have said that there can't be any inhibition on inherent powers, any more than the inherent powers of Congress could be inhibited. But we are, with regard to surveillance, in a place where we want to be, that is, with everybody rowing in the same direction. And that is where we want to stay.

Mr. LUNGREN. With respect to the issue of waterboarding, I believe someone already talked to you about the statement of Senator Obama about emergency situations and how, if he were President, he would have to make a judgment at the time. That was in response to a question by Tim Russert about whether we could responsibly beat information out of somebody.

Senator Schumer talked about a hypothetical where thousands of Americans' lives are at threat. And he said, "My guess is most Americans, most senators, maybe all, would say, do what you have to do," so it is easy to sit back in the armchair and say torture could never have been used, but when you are in the foxhole, it is a very different deal. And I respect—I think we all respect—the fact the President is in the foxhole every day."

And then, Professor Alan Dershowitz said that we need to ask questions, such as would you authorize the use of waterboarding or other nonlethal forms of torture if you believed it was the only possible way in saving the lives of hundreds of Americans in danger.

I ask you this because *The New York Times* described the Department of Justice's memorandum on the legality of certain interrogation techniques as simply—this is their description, "preserving the broadest possible legal latitude for harsh tactics."

Do you agree that it is appropriate—it would be appropriate for the Department of Justice, in looking at the legality of those things, "preserve the broadest possible legal latitude for harsh tactics?"

Mr. MUKASEY. It is very tempting for me to answer a hypothetical question that appears to be favorable to a view, as it is for me to be tempted to avoid answering a question that appears to be unfavorable to a view.

That is why I don't answer hypothetical questions.

I think what we try to do is to preserve whatever options we can, under the law, and to permit only what is authorized by the law. That is what we do. And I think it is appropriate for us to continue to do that.

Mr. LUNGREN. And you pledge to continue to do that?

Mr. MUKASEY. I beg your pardon?

Mr. LUNGREN. And you pledge to continue to do that?

Mr. MUKASEY. I do.

Mr. LUNGREN. Thank you.

Mr. CONYERS. The Chair recognizes the distinguished gentlelady from Texas, Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. And thank you, Attorney General. It is a pleasure to have you before us.

And very quickly, I just want to acknowledge and hope that you will review the President's budget. Usually, it is a concession by the department. But the zeroing out or the seeming elimination of the COPS program is completely adverse to, I think, the majority of the Members of this Committee.

So I raise that for your consideration. It is not my question, right now. If you want to give it in the answers that I may ask, I welcome that.

I am concerned about the Civil Rights Division. And I have consistently raised the question, at just about every hearing we have had with an Attorney General, and I again raise it.

And it suggests, the very top—and it may be very far away, Mr. Attorney General, but I would just say to you Federal civil rights investigations 1996 to 2006—and you can see a decided decline down to 2006.

And so I have asked the previous Attorney General to give an explanation for that. We did get what we call in Congress "boiler plate" response from the Justice Department—and let me say on the record that it is totally unacceptable.

I would like for you to go back and to provide me with the numbers of assistant attorneys general for civil rights, their experience and the cases that they have been able to prosecute in the last year—which is 2007, because that goes through to 2008. And I will just quickly go past to my questions.

This, I think, is appalling, and it evidences the collapse of the Federal Government's intervention in egregious actions around America.

In the envelope that I was able to give to you—and I thank you—they are letters to the former Attorney General. And they look at issues such as Harris County jail, where 109 deaths in custody occurred over the last 10 years. We have been asking for a Federal investigation on the Harris County jail.

The Texas Youth Commission has been charged with incidences of sexual abuse against young people.

And then we have a circumstance of our district attorney who has been found with a number of e-mails that really suggest that he has a different view of African-Americans. This is a picture, allegedly, of an African-American with broken watermelon around him. It depicts a Black man lying on a sidewalk surrounded by half-eaten pieces of watermelon and ab empty fried chicken bucket, and it is entitled, "A Black man OD-ing."

We think that these are issues that warrant a larger hand of investigation, and it means the Federal Government.

So my question to you is—and I am very glad to work with our Chairman, because I am looking forward to a meeting, a briefing, a hearing in Houston on this array of abuses.

By may I ask the question about the federal—your view of the view of the Federal civil rights division—and if your answer could be pointed—but in terms of looking at these questions that are raised by Members of Congress as it relates to civil rights of individuals being prosecuted across America?

Mr. MUKASEY. The response of the Civil Rights Division is not simply to questions that are raised by Congress. It is to civil rights problems across the board.

And I have met with the current nominee to be the Assistant Attorney General for the Civil Rights Division. I have met with each of her unit chiefs. And what I have tried to stress—and this is not by way of preaching, but by way of conversation and, I hope, example—that that Division represents—hate to say more than others, but it probably is true, more than others—the essence of what the Civil Rights Division's mission is supposed to be.

Ms. JACKSON LEE. Well, would you join me in encouraging her to look into these series of what I perceive to be violations or egregious incidences, in particular, in Texas?

Mr. MUKASEY. I will certainly call them to her attention. I will encourage her to find out whether we have got jurisdiction to do anything with regard to any of those. And I encourage any Member of this Committee who finds any evidence of a civil rights violation to call it to our attention.

But I want to stress that that Division doesn't simply respond to congressional requests, not that that is unimportant. It is important.

Ms. JACKSON LEE. I understand.

Mr. MUKASEY. But their mission is much more proactive——

Ms. JACKSON LEE. I understand.

Mr. MUKASEY [continuing]. And they understand——

Ms. JACKSON LEE. Let me reclaim my time—because I have two quick questions. One, on the Jena 6 prosecution, as well—was an issue where the department was missing in action.

I want an explanation as to why we did not prosecute or look into the individual prosecutor, but prosecute the perpetrator of the noose originally. This is not during the march.

My last point is on FISA, and to give an explanation as to why the Administration would not accept an amendment that would prevent reverse targeting without securing a warrant when you are trying to get someone who is placed here in the United States.

You are looking after someone on foreign soil, but you wind up getting someone on the United States, and you are doing it without a warrant.

Mr. MUKASEY. The short answer to the last question is there is already a law in force preventing reverse targeting. The language that has been proposed suggests an ambiguity in the standard that would bar us from getting the incoming call from somebody abroad, who we can target, to the United States. And that is the call we want to listen to.

But so far as the claim that the department, that the Civil Rights Division, was missing in action in Jena 6, I most respectfully disagree. We had people there from the Office of Community Relations right away. They are on the ground. They are still looking into that.

We had people from the Educational Opportunities Section looking at the compliance by that school, the school where that incident occurred, with an existing desegregation order. And we are still looking at that incident.

And as you know, we have prosecuted what regrettably has come to be known as a noose violation that occurred when people coming back from the demonstration gathered at an interstate facility, and were greeted by the horrible sight of somebody driving around in a truck with nooses hanging off the back. One of those people has been indicted.

Ms. JACKSON LEE. Well, that was after the fact. I hope you can give me a report of what you did leading up to the tragedy of those six young men being arrested unfairly and prosecuted and their lives taken away because they were prosecuted as adults—felon adults, and nothing happened to the young men who hung the noose originally at that school.

That has to be a civil rights violation that your U.S. attorney failed to prosecute.

And I disagree with you on FISA, but let us hope we can work together on that, because I think we need to protect the civil liberties of all Americans.

I thank the Chairman. I yield back.

Mr. CONYERS. The Chair recognizes Randy Forbes of Virginia.

Mr. FORBES. Mr. Chairman, it is Mr. Cannon who is next. He was here before me.

Mr. CONYERS. Oh, I am sorry. I didn't see Chris Cannon of Utah entered the hearing room and is recognized.

Mr. CANNON. Thank you, Mr. Chairman.

Mr. Forbes is infinitely more important and articulate than I and I would gladly defer to him, but I do have a statement and a couple of questions for General Mukasey.

In the first place, thank you for being here. We appreciate the calm that you have brought to the department.

As the Ranking Member of the Committee on Commercial and Administrative Law, which does not sound relevant, except that it has oversight of the U.S. attorneys and having had, it seems to me dozens and dozens but was probably less than two dozen hearings on the topic, we are glad you are there and directing the department with a firm hand.

Let me ask a question about the D.C. gun ban. The position taken by the Attorney General has raised some concern. And I understand that his position is that he wants to protect the department's ability to prosecute and enforce Federal fire arm laws.

But, notwithstanding those laws, do you agree with the argument that the Second Amendment is an individual right? And does the Administration agree with you as well?

I think—obviously, as you know, the case is up for decision by the Supreme Court, so I am kind of limited in what I can say. The department's position, as outlined in its brief, is that—at least I believe, that the Second Amendment is a personal right. And I understand that to be the Administration's position.

Thank you. I appreciate that very much.

I think it is a personal right. I don't think the Constitution—the words make any sense unless you read it that way, and especially if you look at the history and the failed attempts by some folks to try and rewrite that history, fabricating facts.

So it appears to me that we are on a course to clarify what has seemed to me to always be a straight-forward issue with an at-

tempt to muddle and use Federal law to obfuscate a basic and fundamental right that I think is foundational to America's freedoms.

During much of last year, we have heard the argument that the Department of Justice was broken and a new AG was needed. We have a new AG, Attorney General, but it is my understanding that there are 10 main Justice positions for which nominees have been sent to the Senate, but none have been confirmed.

And those include deputy attorney general and associate attorney general positions.

It appears that you are the quarterback but without a front line. I am wondering if you can talk about the problems you and the American public faces as a result of Senate inaction on these qualified nominees. Do you need some help?

Mr. MUKASEY. We need to get confirmed nominees in the positions for which they have been nominated.

That said, I must say that the people who are functioning in acting capacities are functioning well and valiantly. But that is not to say that we don't need—what we need is stability and a sense of stability that is conveyed by having a confirmed nominee there. That is what we need.

Mr. CANNON. Thank you. I agree entirely with that. We have wonderful career bureaucrats in the Justice Department, people who are committed to the ideas and the continuity of what the Justice Department does, whether or not you have a Republican administration or a Democratic administration.

But it just seems to me that they are programmed to work in a situation that includes political appointees, and the Senate has a responsibility to confirm those appointee who are—if they are qualified, and I don't think there has been any question about their qualifications, just delay and more delay on the part of the Senate.

Of course, there is a lot of delay on other issues as well. But this one is vital, it seems to me, and they need to come forward.

The matter of the CIA's destruction of video tapes of interrogations of terror suspects has received a great deal of attention recently. I understand that there is an ongoing investigation of the matter and that you may not be able to say much about it today.

Can you discuss your decision on the appointment of veteran Federal prosecutor Mr. John Durham and why you chose not to appoint a special counsel?

Mr. MUKASEY. I can't get into confidential discussions and executive matters. I can say that we looked initially to the U.S. Attorney's Office in the district where the CIA is located. That U.S. Attorney's Office, by mutual agreement, recused itself, and we appointed John Durham to be the acting United States attorney for the purpose of—to be—the United States attorney for the purpose of this case and to investigate this case.

The fact that one office recused itself does not in any way disqualify the department from conducting the investigation and to say that because this is a case that has gotten a great deal of attention necessarily means that we have to go outside the department and appoint a special prosecutor and so forth sends the wrong message in two respects.

One is, it undermines confidence in the department to deal with cases involving public officers. We have a whole public integrity

section that deals with cases of that sort, would send that message to the public at large, and it would also tell the department, you can't be relied on to investigate a case that has widespread public interest.

Neither of those messages is warranted.

Mr. CANNON. I think I agree entirely with both of those points. And recognizing my time is expired, Mr. Chairman, I yield back.

Mr. CONYERS. The Chair recognizes the distinguished lady from Los Angeles, CA, Member of this Committee, Maxine Waters.

Ms. WATERS. Thank you very much, Mr. Chairman. I would like to thank the Attorney General for being here today, and to just say that I and others believe that the department is absolutely broken and lacks credibility, and that the past Attorney General resigned in shame and dishonor.

And so I am very concerned about one of your statements. On page 24 of your written statement, under a headline called "Protecting Communities from Violent Drug Offenders," you state that nearly 1,600 convicted crack dealers will be eligible for immediate release—and you emphasized the word "immediate"—if Congress doesn't act.

You also stated, "Retroactive application of these new lower guidelines will pose significant public safety risks."

Such a statement appears to me to be a distortion of the Sentencing Commission's decision, because it completely ignores the process that must be followed before anyone is released.

Mr. Attorney General, isn't it true that the Sentencing Commission's decision does not provide an automatic release?

Mr. MUKASEY. It provides for an automatic downtick in the guideline range, and for sentencing.

We have to understand, though, the context in which that would arise. It arises in a case that, almost by definition, occurs some substantial time before it comes back to the court. It necessitates the court going back through the record.

It, in many cases, involves having the United States attorney who—if you are lucky, he is still there.

If he remembers the case or not, is something else, again. And it has to come up then for resentencing.

They are eligible for automatic release, that much is true. They also get the benefit, as others in prison do not get the benefit, of the new—relatively new regime under Booker in which the guidelines themselves are optional. So we have selected out for better treatment that group of defendants who then get resentenced under the optional guidelines under Booker.

Ms. WATERS. Well, what you just described was the process. And you described in that process several ways by which one may be eligible or may be released.

Your statement on page 24 does not in any way capture that there is a process. It talks about immediate release. And I think for this department to have credibility again—if it is ever going to gain credibility, that the statements that come out of the mouth of the Attorney General should be ones that we can rely on.

And I bring that to your attention because it is important to always describe that there is a process that—nobody is taking the

key, unlocking the jails and say, "Everybody is out." That does not happen.

Let me just move on with another concern that I have about predatory and subprime lending and race. What we have discovered is that minority communities have been targeted and fraud has taken place. And it is not simply a subprime lending. It is a combination of targeted communities for subprime lending and fraud, and that people of color, African-Americans in particular, have been harmed by this practice.

What have you done, what has the department done to investigate these cases?

Mr. MUKASEY. Facts are being gathered to determine whether there is Federal jurisdiction to prosecute cases of the sort you described. I should point out that we have prosecuted and are prosecuting cases involving discriminatory denials of credit. We have been doing that straight along, and we have done it in a number of——

Ms. WATERS. I am interested in the crisis that we are in now. I was in Ohio, for example, where whole blocks were boarded up in an African-American community. And also we are finding that in California, where San Bernardino-Riverside area ranks number 5 in foreclosures in the country, that they, too, are minority communities.

I am wondering if specifically you have done anything to look at that kind of targeting and the race questions.

Mr. MUKASEY. We are gathering facts to determine whether we have jurisdiction to prosecute any of those as criminal violations. If we don't, obviously, there is going to have to be legislation from this Congress.

Ms. WATERS. Would you be wiling to come forth with suggested legislation if you find you do not have a jurisdiction?

Mr. MUKASEY. If we can come up with legislation, we hope to work with Congress to get it—if it is necessary.

Ms. WATERS. How long do you think it will take you?

Mr. MUKASEY. I cannot, as I sit here, give you a deadline, I am sorry.

Ms. WATERS. But it is one of your priorities?

Mr. MUKASEY. It certainly is one of my priorities.

Ms. WATERS. I would certainly hope so, Mr. Attorney General.

Let me point you to the Gulf Coast. After Hurricane Katrina, during field hearings of the Financial Services Housing Subcommittee in Mississippi and Louisiana, a number of witnesses complained about local actions to keep African-American renters out of their communities—Saint Bernard Parish, for example—and local resistance to the development of affordable housing that appears to be based on racial makeup of the prospective tenants, as much as it is to objections to affordable housing.

These actions and resistance are having a serious adverse impact on the ability of hurricane-ravaged communities to provide and rebuild the affordable housing stock in their communities and contributing to the ongoing housing crisis for poor minority people.

At least one private Fair Housing Act lawsuit against St. Bernard Parish has been brought.

Has the Civil Rights Division initiated any such lawsuit? Is the Civil Rights Division investigating any allegations that such resistance to affordable housing projects violates the Fair Housing Act?

Mr. CONYERS. The gentlelady's time has expired but——

Ms. WATERS. Could I get an answer, Mr. Chairman——

Mr. MUKASEY. The short answer is, I don't know the particular circumstances you have described, but I am more than willing to get back to you in a question—in written form, because I think the question deserves—certainly deserves an answer.

Ms. WATERS. And while you are doing that, would you also check out the race-based advertising on the Internet as it relates to housing in that area?

Mr. MUKASEY. I will check out whatever—what you have asked about.

Ms. WATERS. I am asking about that, too.

Mr. MUKASEY. Okay.

Ms. WATERS. Thank you.

Mr. CONYERS. The Chair recognizes Randy Forbes of Virginia, the former Ranking Member of the Crime Subcommittee.

Mr. FORBES. Thank you, Mr. Chairman.

And, Mr. Attorney General, thank you for being here.

To say the department is not now, nor has it ever been in its history perfect, nor will it ever be perfect, seems obvious to anyone who has ever been involved in government, but to suggest that means the department is broken is certainly a misnomer and a stretch.

And I am just like to switch to a little different topic now. We have had former Attorney Generals that have testified, and we have had a number of other people in various departments about a different issue, one that the Chairman of the Subcommittee on Crime and Terrorism and Homeland Security was courteous enough to have a hearing on recently, and that is espionage.

And the question I would ask for you today, do you agree with the testimony that we have had that China is currently the number one espionage threat to the United States?

Mr. MUKASEY. I am really not at liberty to talk about matters that are classified. And part of the problem is that the information that I have about that comes in part based on classified information to which I have access. And I am very reluctant to get into that.

Mr. FORBES. Is there any part of that, since we have had much of that it has been testified to, some by your department, that was not in a classified setting, is there any part of that espionage that you can testify about today?

Mr. MUKASEY. Not that I am aware of as I sit here, and I don't want to make any mistake in the wrong direction.

Mr. FORBES. Okay.

Mr. Chairman, then I don't have any other questions.

Mr. CONYERS. The Chair is pleased now to recognize the Chairperson of the Immigration Subcommittee, Zoe Lofgren of California.

Ms. LOFGREN. Thank you, Mr. Chairman.

And thank you, Mr. Attorney General, for being here with us today.

One of the things I am interested in is the efforts you are making to adjust or to recoup for some of the problems that we discovered in the Department of Justice.

For example, last year, the Department of Justice's former principal deputy director of public affairs, Monica Goodling, appeared here and testified that she applied a political litmus test to determine who would hold certain positions in the Department of Justice.

And, if I recall correctly, she said she stepped over the line. What she actually meant was that she violated the law by providing a political litmus test in the appointment of immigration judges who are civil servant appointees and not political appointees.

And I am wondering what concrete steps you are taking, both about future hiring decisions when it comes to immigration judges and how to deal with the politicization of what should have been civil service appointments, in your new post?

Mr. MUKASEY. Well, as you know, some of that is still under investigation by——

Ms. LOFGREN. I am just telling you what she told us, here, under oath.

Mr. MUKASEY [continuing]. The Office of the Inspector General and the Office of Professional Responsibility.

However, I have, myself, signed appointments of immigration judges. And I think I have made it clear that any political consideration, in that regard, is not to be made.

And I have said that on more than one occasion. And I have not seen, in those appointments—and believe that I will not see in any future appointments—any evidence of anything of that kind.

Those are merit appointments, and those should be merit appointments. Those will continue to be merit appointments.

Ms. LOFGREN. Well, just to follow up on the general topic, Chairman Conyers and I sent you a letter in January—and I am not complaining that you haven't answered yet, because it was just a few days ago—but, talking about a Board of Immigration Appeals decision that radically reverses a longstanding policy of our government about asylum for victims of female genital mutilation.

And I am concerned—I don't want to say that there is a political issue. But this has been well-settled law for a very long time. We give the citations.

And I am just hoping that you can take a look at, not only that letter and the citations, but make sure that there is no political overtones to such a radical departure from well-settled law.

Mr. MUKASEY. I mean, I can't imagine how there would be a political overtone, but I am going to look at the letter and the underlying opinion.

Ms. LOFGREN. I meant to follow up on another subject, and I know there has been a lot of discussion about this. But on the FISA bill that we are working on, obviously, we are working in good faith to get the best bill that we can, that gives the government the tools it needs but also respects the Constitution.

And I am hopeful that we will—if the Senate can move—that we will have a good bill that we will be able to send to the President for his signature.

It seems to me, earlier today, you testified that the telecommunications companies had not violated the law.

And I just—I am a little stunned, actually, to think that, if we gave you a bill that had all of the tools that you wanted, that allowed you, the Administration, that you would recommend that it be vetoed simply because of a monetary damage issue for—or the potential exposure of liability to these private companies.

Is that really your position?

Mr. MUKASEY. No. And I am glad you raised it in that form. It is not simply a monetary issue. It is a signal to them, essentially, that, if you are asked, in good faith—you respond in good faith to a request to cooperate with the government; you are assured that your activity is lawful; and you then cooperate, that you do so at your own risk.

Because that is a statement not simply to the telecoms but it is a statement to every business, every CEO in the country.

Ms. LOFGREN. Well, but CEOs also have an obligation to independently adhere to the requirements of the law.

I will give you an extreme example. If you went to me and said, "Here is a gun; shoot Adam Schiff," I couldn't say that that is——

Mr. SCHIFF. Can you use a different example?

Ms. LOFGREN. A different example? [Laughter.]

I couldn't say that is okay, because you told me to do it.

Mr. MUKASEY. That is correct. But to say that you should not shoot Representative Schiff, because I asked you to do it—understanding that I would not do that——

Mr. SCHIFF. Mr. Chairman, can we change the hypothetical?

Ms. LOFGREN. Yes. [Laughter.]

I will change the hypothetical——

Mr. SCHIFF. Thank you.

Ms. LOFGREN [continuing]. With discharging a fire alarm to hit that pitcher of water, in violation of the law.

Mr. MUKASEY. That is all light years away—light years away from what we are talking about here. We are asking, and suggesting to companies, essentially, that they cooperate, at their peril, and that the only rational thing for them to do is to get a court order, to resist cooperation, and essentially to lengthen the process and prevent us from getting their cooperation.

And that is a signal that is being sent, not simply to telecoms, but to business across the——

Ms. LOFGREN. I very much disagree, Mr. Attorney General.

Mr. MUKASEY [continuing]. Cooperate with law enforcement, and they do cooperate with law enforcement.

Ms. LOFGREN. I know my time is expired, but I will just say that no court is going to assign liability unless there is a pretty clear and bright line to accompany.

I just don't see how, number one, retroactively, if they have done nothing wrong, what the problem is. Ordinarily, we do not enact laws to prevent ongoing cases from being heard and, prospectively, you know, if we were to sit down, I am sure we could coming up with something reasonable, but we have just gotten, kind of, a stonewall from——

Mr. MUKASEY. This is an issue of ongoing litigation, disclosing details of their participation, disclosing who participated and who

didn't, exposing them to not only a hit in the stock price, but sabotage and other acts, simply, we think, is unacceptable, and would result from a continuation of the litigation.

That is why we are opposed to it, in addition to the push-back that we are going to get, and that has already started.

Ms. LOFGREN. My time has expired. Mr. Chairman, I appreciate your indulgence.

Mr. CONYERS. Steve King is the Ranking Member on immigration, from Iowa. We recognize him at this time.

Mr. KING. Thank you, Mr. Chairman. And, Attorney General Mukasey, I want to thank you for your testimony here today. It is, I think, a very capable testimony that demonstrates a clear understanding of duties in the law.

And I recognize that you haven't had a lot of time to get acclimated to this particular task.

But I do have a number of things I would like to discuss with you. And one of them would be, I believe, something that needs to be explored a little more thoroughly.

And that is the issue of the liability with regard to FISA, and companies that are in a position to provide information that can help our national security, protect American lives and American national security.

And we have had some significant discussions, in this chamber, about the liability and how one might address that. But I don't know that we have had discussion about the intimidation effect.

And I am just going to speculate that not only telecommunications companies and other communication companies that have a lot of data out there that can be stored and sorted, that one can find indicators in, to be able to target Al Qaida and other enemies of the United States—not only those companies but other companies across the spectrum of services.

It might be cell phone companies, for example. And the idea that because there is not liability protection, then can—I am going to presume—and I am going to ask you how this might affect our national security—I am going to presume that these are—there are companies now that are gathering their legal brains together and meeting together in their trade associations to determine how they are going to protect themselves from this impeding liability.

And do you believe that that could affect our national security?

Mr. MUKASEY. I certainly do. And, again, here in part I am going on the basis of my experience as a private lawyer, and that is that companies want to protect themselves from liability. And it may very well be that the best way to protect yourself from liability is not to have the information in the first place.

It may very well be that the best way to protect yourself from liability is to resist, to say, "Under ordinary circumstances I would love to cooperate, but in the current atmosphere I can't be certain that my cooperation isn't going to be the subject of a lawsuit, so I need a court order."

And all of that adds burdens, and sometimes—obviously, if information is destroyed, will deprive us of the opportunity to get the information, to get the cooperation.

Mr. KING. Even though we have had some discussions about the destruction of some tapes that had to do with some interrogations,

we may well be, as we sit here, be having information that is being destroyed by private companies so that they don't have to consider whether or not to provide information if it is requested because of the liability that is potential.

Mr. MUKASEY. An important consideration.

Mr. KING. Thank you.

Moving on to another subject, on the Voting Rights Act, in the investigations that have gone on in some of the covered districts, the judgment that might come from the Department of Justice on whether to initiate an investigation, what might that be based upon?

Mr. MUKASEY. I can't, as I sit here—I mean, I have expressed a reluctance on many subjects about answering hypotheticals. But the fact is that we have litigated and defended the renewal of the Voting Rights Act, the constitutionality of that, and we are going to continue to do that.

And, obviously, we are looking at patterns and practices, if there are such, of race-based denial of the right to vote, and so on, that would result in instituting——

Mr. KING. Would you agree also that it would be based upon an objective analysis of existing law and the Constitution?

Mr. MUKASEY. Absolutely.

Mr. KING. And if there are any issues aside from that, say if a local jurisdiction had passed some immigration enforcement law, it would have no bearing upon the consideration of the department? Immigration enforcement law?

Mr. MUKASEY. As I sit here now, I can't think of the connection between the passage of an immigration enforcement law and a voting rights offense.

That said, if somebody showed such a connection, then that is something that somebody would have to look at.

Again, I am reluctant to deal with hypotheticals.

Mr. KING. Thank you.

And I want to just quickly switch to hate crimes. And we had witnesses, here at this same table that you are seated at, with regard to the Jena 6. And U.S. Attorney Washington testified, seated at that table, that he didn't believe that hanging a noose on—that he believed that hanging a noose in a tree, in Jena, was a hate crime. So did every witness on the panel agree that it was a hate crime.

And yet the follow-up question was that, did that they believe that the assault on the young White gentleman—and particularly the name in the press is Mykal Bell, as one of the perpetrators, who has since confessed.

The testimony from the U.S. attorney was that he didn't believe that the assault on that young fellow by six African-Americans was a hate crime.

And I am having trouble reconciling that. And I wonder if you might be able to do that.

Mr. MUKASEY. Jena is a matter that is still under examination. I am reluctant to comment on matters that are under examination.

We do hate crimes. We prosecute hate crimes, the one as well as the other.

Mr. KING. I hope that is the case. I trust it is. And I appreciate your response, Attorney General.

And I thank the Chairman. I yield back.

Mr. CONYERS. Thank you.

The Chair is pleased to recognize Robert Wexler, the gentleman from Florida.

Mr. WEXLER. Thank you very much, Mr. Chairman.

Welcome, Mr. Attorney General. Thank you for being here.

I would like, with your permission, to go back to an issue raised by Mr. Berman, which is this Administration's failure to comply with congressional subpoenas.

This unprecedented obstructionist policy I think is best exemplified by the refusal of White House Chief of Staff Joshua Bolten and the former White House counsel, Harriet Miers, to even appear before this Committee to answer legitimate questions about the firing of nine U.S. attorneys.

As I know you are aware, on July 25 of this past year, this Committee approved contempt citations for both Mr. Bolten and Ms. Miers for their unprecedented refusal to appear before this Committee.

Sadly, this behavior, abuse of power, in my mind, by this Administration, is a pattern of limitless executive branch usurpation of authority. We have experienced endless executive privilege claims in the areas regarding the U.S. attorney firings, illegal wiretapping, and, of course, in the most notorious case, where the executive privilege got to the ludicrous point of Vice President Cheney arguing that he wasn't even a part of the executive branch in order to avoid a Freedom of Information request.

These abuses of executive power and the fact that the White House still refuses to provide any answers whatsoever to subpoenas is one of the primary reasons I have called for impeachment hearings regarding the Vice President of the United States.

I think it is unfortunate, I think the American people lose in a big way, but I believe—by the Administration not providing information—but I believe that impeachment hearings are the only way to actually obtain answers from this Administration.

With that context, I am curious, have you been instructed by the President of the United States to enforce or not to enforce contempt citations issued by the Congress?

Mr. MUKASEY. Respectfully, I cannot go into and will not go into, by way of affirmance or denial, any conversations that I have had with any other member of the executive on that subject or related subjects.

I should say that there is a long line of authority, going back several Administrations, back to the Clinton administration and beyond, that says that the enforcement by way of contempt of a congressional subpoena is not permitted when the President directs a direct adviser of his, somebody who directly advises him not to appear or when he directs any member of the executive not to produce document.

That much said, there is a long history as well of cooperation and accommodation between branches, between Congress and the executive in accommodating one another's needs so that we don't have to come into collision in that fashion.

Mr. WEXLER. Thank you, Mr. Attorney General.

Cn you tell me the individual that President Clinton instructed not to even appear before this Congress?

Mr. MUKASEY. Walter Dellinger rendered an opinion respecting the reach of executive privilege. I can't sit here——

Mr. WEXLER. I didn't ask about opinions. I am asking if President Clinton instructed any individual in the Clinton administration not to appear before Congress.

Mr. MUKASEY. I do not know that.

Mr. WEXLER. Okay. There is nobody. This is an unprecedented act where the President of the United States has taken the position that a high-level Administration official should not even appear. And I asked—I will ask it more generally, then—have you been instructed to enforce or not enforce congressional citations?

Mr. MUKASEY. I will give the same answer that I gave before, which is that conversations between executive branch members are privileged. And that doesn't mean that I have or have not.

Mr. WEXLER. Okay, fair enough.

Should Congress pass a contempt citation, will you enforce it?

Mr. MUKASEY. A contempt citation of——

Mr. WEXLER. With respect to the subpoenas, with respect to Mr. Bolten?

Mr. MUKASEY. If you are talking about a contempt citation based on Mr. Bolten's failure to appear——

Mr. WEXLER. Yes.

Mr. MUKASEY [continuing]. In response to a direction by the President that he not appear, the answer is no. Because he can't violate that request.

Mr. WEXLER. Are you the people's lawyer, as you said to the Senate, or are you the President's lawyer?

Mr. MUKASEY. I am the Attorney General of the United States. And it is my obligation to enforce all legally binding precedent.

Mr. WEXLER. Thank you, Mr. Chairman.

Mr. CONYERS. I am pleased now to recognize Judge Louie Gohmert of Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank you, Attorney General. It is a pleasure having you here.

In talking with Darrell Issa during the break, previously, he was an enlisted man in the Army, and having gone though basic, as he did, and I went through officer basic—we were both sharing stories.

And we are wondering, because of some of what we believe was torture—I mean, people were put at risk in the training we went through in the water. We drug one guy out, passed out. If we hadn't been there, he would have died.

If we can find our drill sergeants' names, would you be willing to prosecute them for water torture?

It was pretty rough, what we went through.

Mr. MUKASEY. I don't—I don't know what you went through. And I am not going to—I have expressed a reluctance to answer hypotheticals. And I am——

Mr. GOHMERT. Well, the truth is, apparently, the Army believed that there were some risks in making us go through training like

that. But because of the risk that we faced by those who hated our country and wanted to destroy it, it was worth putting us through that kind of rigorous training.

So it just occurs to me that we have people in uniform of our own country that go through worse so-called torture by drill instructors than those that are being defended in Congress at this time who want to destroy our country.

But now I am very concerned about this issue, and it came up in your first series of questions, about would you go after our intelligence officers or our military officers who relied on the representations, no matter how good or bad, by a prior Attorney General, by a prior Justice Department, and prosecute them for following that instruction from the Department of Justice.

The message that would come out of that is devastating. For people who are in uniform, for intelligence officers to be told, "You follow the instructions and the direction of the Justice Department and that is meaningless because we still may come after you and put you in jail," will have such a chilling effect on the protections of this country and the kind of people that lost their lives on 9/11, and it really scares me.

Now, if we disagree with the position of a Justice Department, we can do in this great country what was done when people raised Cain over our friend Alberto Gonzales. There are some things that could have been done better. No question about that. That is how we move forward.

But I, for one, and I know there are plenty others that appreciate the fact that you are not willing to do what was done in the movie "Animal House" there where a guy put his hand around the poor guy whose car had been wrecked and said, "Hey, you messed up. You trusted us."

We shouldn't have Attorney Generals in that position, and I appreciate the fact that you really don't want to go there.

Now, I also had some concerns, wasn't there a sergeant who was kidnapped, and because FISA had gone out, we were blind for at least 3 days, we gave his captors 3 days' lead time when we couldn't protect one of our own? Was there something to that story?

Mr. MUKASEY. I have heard an account relating to a delay necessitated by applying for authorization to conduct surveillance. We prepared the papers as quickly as we could and applied.

I think that puts a human face on the problem posed by delays generally. I am not familiar with the details, but I do know that we acted within a matter of a couple of hours to put together the necessary papers to try to resolve that.

Mr. GOHMERT. You had some hypothetical thrown at you by my friend, and I have great respect for the Chairman of the Immigration Subcommittee talking about Monica Goodling. And she did say words to the effect that she may have stepped over the line when she used political considerations.

But my understanding of her testimony and my understanding in talking with her afterwards was that wasn't about immigration judges, that was about staff. And she had concern, as conveyed to me, that where someone says that laws like election fraud, we shouldn't bother prosecuting those, that she felt like that was a po-

litical consideration that merited her consideration in whether or not to hire them.

That is the kind of political consideration she was talking about, General, that some people—she thought perhaps that is a political consideration, would they follow the law, prosecute all laws, because some people pick and choose between which laws.

And she was a wonderful employee, and I think she was done wrong here, and I just wanted to make sure the record was straight, as I believe, of what she said and what she meant here before this Committee.

Now, I see my time has run out. I am grateful you are here. And I am grateful you are the Attorney General. Thank you.

Mr. CONYERS. The Chair recognizes William Delahunt, the distinguished gentleman, ex-prosecutor, from Massachusetts.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. Attorney General, in response to the first question that was posed by Chairman Conyers, maybe I misunderstood your response, but it went something like this, that, if an opinion was rendered that an individual acted in a way pursuant to a legal opinion of the Attorney General, that would insulate him or her from any criminal responsibility regarding his actions as an assistant Attorney General, or someone from the White House.

Or maybe I am confused. Because it sounded like a brand-new legal doctrine to me.

Mr. MUKASEY. I think what I said was that we could not investigate or prosecute somebody for acting in reliance—we, being the Justice Department—could not investigate or prosecute somebody for acting in reliance on a Justice Department opinion.

This is the question specifically concerning——

Mr. DELAHUNT. Okay, but——

Mr. MUKASEY [continuing]. The disclosure that waterboarding——

Mr. DELAHUNT. Okay. If that Justice Department opinion was inaccurate, and in fact violated a section of the, you know, U.S. criminal code, that reliance is, in effect, an immunity from any culpability, any criminal culpability?

Mr. MUKASEY. It is a justified reliance that could not be the subject of a prosecution.

Immunity connotes culpability.

Mr. DELAHUNT. You know, this is—this is brand-new legal theory, at least in terms of my own legal scholarship.

I mean, relying on an opinion that has—is inaccurate, that is mistaken—and I am not looking to prosecute any, you know, individual in the Department of Justice or any of our government agencies. But one would only need to secure a Department of Justice opinion to be insulated from prosecution.

Am I accurately portraying your position?

Mr. MUKASEY. What I said was that the disclosure that waterboarding was part of the CIA interrogation program at the time that it was carried out and that it was permitted by a Justice Department opinion would bar—should bar—an investigation of the people who relied, justifiably, on that opinion in conducting their activity——

Mr. DELAHUNT. But for—excuse me, for the sake of argument, let us hypothetically concede that waterboarding is in contravention to an international obligation, pursuant to the Convention against Torture.

And if an opinion was rendered that amounted to malpractice that whoever employed that particular technique, simply by relying on that opinion would—ought not to be investigated or would be legally barred from investigation and criminal responsibility—is that what you are telling us?

Mr. MUKASEY. If you are talking about a legal mistake, there is an inquiry with respect to, not the OLC opinions I am talking about, but other OLC opinions relating to surveillance that relate to whether people properly rendered opinions or didn't.

But to rely on an opinion that some later Attorney General thinks is mistaken would, yes, bar the person who so relied in good faith from being prosecuted.

Mr. DELAHUNT. I find that—I find that position a new legal doctrine, if you will. The law is the law. We can all have opinions in terms of our understanding and interpretation of the law.

And if what you are saying—and if we can agree, just for the sake of discussion purposes, that waterboarding violates not only American domestic law, but our international obligations under the Convention of Torture, if there is an opinion promulgated by the department, it insulates those who actually perpetrated the act or even ordered the act to be conducted.

Mr. MUKASEY. The laws you are talking about are phrased in general terms as to which there is a great deal of dispute, some people lined up on one side, others lined up on another.

If it comes to pass that somebody at a later date finds that the opinion should have been different from what it was, the person who relied in good faith on what the person who arrived later says was an erroneous determination is protected, because to do otherwise would be to say to everybody out there, "You can't rely on any——"

Mr. DELAHUNT. But is there legal precedent for that statement that you just made to this Committee?

Mr. MUKASEY. There is a practical consideration.

Mr. DELAHUNT. Okay. But there is not a legal precedent for it?

Mr. MUKASEY. I can't sit here and cite you a case.

Mr. DELAHUNT. Okay.

I yield back.

Mr. CONYERS. The Chair recognizes Linda Sánchez, who is the Chairperson of Subcommittee number five, Administrative Law.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

And thank you, Mr. Mukasey, for coming and indulging our questions.

One month ago Chairman Conyers, Representative Pascrell and I sent you a letter addressing our concerns about the growing number of deferred and nonprosecution agreements pounded out by Federal prosecutors.

To date, we have yet to receive a response from your office. We discussed this personally on the phone yesterday.

But I just want to bring to your attention that that letter highlighted a study that was conducted by Lawrence Finder and Ryan

McConnell, which found that the number of deferred and non-prosecution agreements between the Department of Justice and corporations had grown exponentially last year to 35 from just five in the year 2003.

Having said that, that study in many ways is incomplete because in fact there is no requirement to report these agreements and therefore we are not even sure exactly how many agreements between corporations and Federal prosecutors actually exist.

I am curious in knowing when you will disclose to this Committee all of the information relating to these agreements that was requested in our letter of January 10th.

Mr. MUKASEY. You are right, we discussed this yesterday, and I am going to get back as promptly as I can with respect to your letter.

I do want to stress, as we discussed yesterday, that the increasing phenomenon of monitors is something that we noticed well before there came to be publicity about it and have been looking into it.

We have asked the Attorney General's Advisory Committee, which is a group of United States attorneys from around the country who can gather information from United States attorneys about the prevalence of the phenomenon and whether there is a way of coming up with best practices or guidelines——

Ms. SÁNCHEZ. But the question I am asking you is, when can we expect to receive the information that we have requested in the letter?

Mr. MUKASEY. I can't give you a deadline. That is one of the things we want to gather up, to figure out not only the numbers, but what to do.

Ms. SÁNCHEZ. Okay.

Mr. MUKASEY. And it is an outgrowth of increased prosecution of corporations——

Ms. SÁNCHEZ. Let me ask you this. Do you support the full disclosure by the Department of Justice of all deferred and non-prosecution agreements prospectively in the future, moving forward?

Mr. MUKASEY. With respect, I would like to hear from the Attorney General's Advisory Committee as to not only the prevalence of the phenomenon, but whether confidentiality agreements serve or disserve the larger interest in seeing to it that wrongdoing is rooted out, that people who have to be prosecuted, individuals that have to be prosecuted are, and that unnecessary damage isn't done.

Ms. SÁNCHEZ. So, at this point——

Mr. MUKASEY. I will try to get the information for you.

Ms. SÁNCHEZ. Okay. Now, attention to the issue of deferred prosecution agreements came about, in part, because of the actions of U.S. Attorney Christopher Christie.

In the process of deferring a prosecution, Mr. Christie selected his past superior, former Attorney General John Ashcroft, to serve as a Federal monitor and collect fees reported to be in excess of $52 million.

I know that, during your testimony to the Senate Judiciary Committee, you admitted deficiencies in the way that Federal monitors are selected, and made the suggestion that, in the future, Federal

prosecutors may have to submit reports to the department on the selection of those monitors.

Do you believe that a lack of guidelines on how independent corporate monitors are selected has fostered the appearance of cronyism, where U.S. attorneys can appoint their friends and former superiors to those lucrative positions?

Mr. MUKASEY. I think it is helpful to have the experience of other U.S. attorneys, before a U.S. attorney embarks on a course of conduct, be it the selection of a monitor or anything else.

And without getting into labels like "cronyism" and so on, I think it is useful to know what the best way is to go about it, whether it involves the company in the process of selecting from a group or what.

Ms. SÁNCHEZ. Let me ask you—do you think that the contract that was awarded to Mr. Ashcroft was excessive?

Mr. MUKASEY. I don't know the details of the contract that Mr. Ashcroft has. And I would point out that the money that we are talking about is not public money. This is money that comes from the corporation. I know no other details.

Ms. SÁNCHEZ. One of the things that I am very deeply concerned about, with respect to this particular issue, is the lack of any judicial oversight in regard to deferred prosecution agreements.

And I am going to give you, just, an example.

For example, if an individuals is charged with a crime and agreed to a plea bargain with the prosecution, then that plea must go before a judge who has the power to deny and, in some cases, alter that agreement, based on judicial discretion.

However, with regard to deferred prosecution agreements that are struck between Federal prosecutors and corporations, neither party ever sees the inside of a courtroom, let alone have to put these agreements before a judge.

So I am wondering if you concerned that this has created two completely different systems of justice, one for individuals, that is accountable to the judiciary, and another for corporations, that is based entirely on the discretion of Federal prosecutors.

Mr. MUKASEY. All right. Prosecutors proceed under guidelines that are very strictly set by the department, that are very strictly reviewed by the department.

Ms. SÁNCHEZ. But there is no judicial review of those deferred prosecutions—or am I mistaken on that?

Mr. MUKASEY. I think you are not mistaken about the question of whether all such agreements are reviewed.

Ms. SÁNCHEZ. Do you think it is generally good policy that they would not be reviewed by a judge?

Mr. MUKASEY. In order for an agreement to be ordered, it would certainly have to be reviewed by a judge.

I think that the decision whether to charge or not charge has always been an executive decision.

Ms. SÁNCHEZ. And yet——

Mr. MUKASEY. And prosecutors reach those decisions in all settings——

Ms. SÁNCHEZ. But yet——

Mr. MUKASEY [continuing]. Regardless of whether they involve nonprosecution agreements.

Ms. SÁNCHEZ. I see that my time has expired. I will submit follow-up questions in writing. And I thank the Chairman for his indulgence.

Mr. CONYERS. The Chair is pleased to recognize the gentleman from Tennessee, Steven Cohen.

Mr. COHEN. Thank you, Mr. Chairman, Mr. Mukasey.

I just want to follow up a little bit on what Mr. Wexler asked you. You represent the United States of America. I know that. But does that also include representing Congress in certain circumstances?

Mr. MUKASEY. It includes representing all interests that I have to represent. I am not familiar with a situation in which the Attorney General directly represented Congress. I am not ruling it out.

Mr. COHEN. Well, in a contempt situation, would you not be in essence representing the actions, the instructions of the United States Congress, if they voted to cite somebody for contempt?

Mr. MUKASEY. In a contempt situation, if a contempt prosecution goes forward, the statute says that it must go forward. And so the Justice Department would be acting at the direction of Congress to the extent it made a contempt finding and directed that an action proceed.

Mr. COHEN. So if Congress does vote to cite Mr. Bolten and Ms. Miers for contempt, you would prosecute them as the statute requires.

Mr. MUKASEY. I think what I said was there is a great deal of authority that says that that prosecution cannot go forward in response to a direction from the President that they not comply with a subpoena.

Mr. COHEN. But if Congress does cite them, then Congress has gone forward. And then you have got a different situation, sir, I would submit to you.

You have got to make a Nicholas Katzenbach decision.

Mr. MUKASEY. I am not familiar with the decision of Nicholas Katzenbach that you are referring to.

Mr. COHEN. Remember when he showed some kind of moral decision to not follow the orders of a President that were improper?

Mr. MUKASEY. The decision about whether to permit a senior adviser to testify before Congress raises substantial issues of separation of powers. And in response to an order that that not go forward, I cannot envision going forward.

Mr. COHEN. So if Congress does vote to cite them for contempt, you would not comply with the duties of your office and prosecute that case, based on some other opinion you have of Congress overreaching, in your opinion?

Mr. MUKASEY. I will examine what happens when it happens. But I would certainly not hold any hope or expectation that I would act in contravention of a longstanding authority which says that senior advisers to the President are not obligated to—cannot be prosecuted for contempt in response to a direction that they not appear—direction from the President.

Mr. COHEN. Is it that they shouldn't testify, or they shouldn't appear?

Mr. MUKASEY. Senior advisers?

Mr. COHEN. Yes, sir. Should they not testify or should they not appear?

Mr. MUKASEY. The latter, I believe.

Mr. COHEN. They shouldn't appear and, obviously, then not testify?

Mr. MUKASEY. I believe that is correct.

Mr. COHEN. Would you think it would be more appropriate to appear or have a counsel appear?

Mr. MUKASEY. My notion of propriety is something that, I have said before and I will say again, I try to leave out of it.

Mr. COHEN. But that is an action. If somebody does not even appear, that is a separate action from not testifying. One thing is asserting an immunity, and saying, "I cannot testify to that because I have an executive privilege."

Another thing is the action of not even responding and coming to the congressional Committee, and/or have somebody come on your behalf. That is a separate action.

Do you think executive privilege goes so far as to say, you don't have to appear and assert your privilege?

Mr. MUKASEY. I understand the distinction. I believe that the authority, with respect only to senior advisers to the President, is that they not only need not testify; they need not appear.

Mr. COHEN. Let me ask you this. Ms. Goodling said she went beyond. And she had immunity. And she obviously did something. You said something about immunity implies culpability, right?

And she got immunity when she testified here. And she said she went too far.

What have you done to instruct your Justice Department not to go too far and not to be political in whom you hire and whom you use the honors program, in particular?

Mr. MUKASEY. I have had, in conversations and public pronouncements—being a very large number—in which I have made it quite clear——

Mr. COHEN. Any memos?

Nothing in writing?

Mr. MUKASEY. As I sit here, I can't—I will provide you with any memos that embody that thought. There is plenty in writing that embodies that thought.

Mr. COHEN. Let me ask you this. The drug war—we have had a drug war for many years, going back to Nixon. It has been a long time we have had drug wars.

We still have it. Obviously, we haven't—you would agree we haven't necessarily won it; it is still going on, right?

Mr. MUKASEY. I believe we continue to prosecute drug cases.

Mr. COHEN. What do you think we should do differently to win the drug war and the scourge of meth, the scourge of crack and cocaine, and drugs like that?

What can we do to win that war, or should we continue to do what we have been doing, over the years?

What changes can you recommend?

Mr. MUKASEY. We are changing our strategies in response to the strategies of the people who are trying to sell this stuff.

We are cooperating with foreign governments to a degree unprecedented in our history, most particularly with the government of

Mexico, which has extradited people in record numbers and is experiencing enormous violence, as it constricts the areas in which drug cartels can function.

And they have undertaken, literally, a life or death struggle, in which they are helping us and we are trying to help them.

Mr. COHEN. I was looking more——

Mr. CONYERS. The gentleman's time has expired.

Mr. COHEN. Thank you, Mr. Chairman.

And thank you, Mr. Mukasey.

Mr. CONYERS. The Chair recognizes Adam Schiff, the distinguished gentleman from California and the former assistant U.S. attorney.

Mr. SCHIFF. Mr. Attorney General, I appreciate your being here. As a former member of the department, I am delighted that there is new leadership at the department.

I am gravely concerned, though, about your testimony on the torture issue, which I find murky, ambiguous, and which establishes no bright line.

I am concerned about it for what it says to our own personnel, and I am concerned about it for what it says to the rest of the world.

And I think it will be very hard for you to make the argument with other Nations, when our troops are captured on the battlefield, that they cannot torture because we don't torture.

I think our argument will be undermined by any ambiguity on that subject here at home.

And I believe that the buck really stops with you, Mr. Attorney General. I don't think that it can be delegated to a relatively anonymous attorney at the Office of Legal Counsel to decide what is lawful and what isn't lawful.

What I would like to ask you is the following. Shouldn't it be the job of the Attorney General to investigate whether the law has been violated, notwithstanding whether there is an opinion by a lawyer at the DOJ that believes otherwise?

Shouldn't it be the responsibility of the Attorney General to investigate whether the law has been broken?

And, if the law has been broken, then come before the American people and say: The law was broken; people were tortured in violation of the law; we have curtailed that practice; and I am recommending either, A, that those responsible be prosecuted or, B, that those responsible not be prosecuted because they acted in good-faith reliance on an opinion; or that they be prosecuted and the President consider the power of the pardon.

But to abdicate, in my view, to say that, because of an opinion of legal counsel, we don't need to investigate whether the law was broken, seems to me a belittling of your responsibility as Attorney General. And I wish you would comment on that.

Mr. MUKASEY. Generally, I have resisted requests to comment on vast, unfocused questions.

Mr. SCHIFF. Well, let me focus the question. Why don't you investigate whether the law was broken, and then make a determination about whether prosecution is warranted, instead of taking a position you are not even going to investigate whether the law was broken?

Mr. MUKASEY. The only signal for the conduct of such an investigation is the disclosure that activity that some people claim is illegal but is in fact the subject of an opinion, namely that it was legal for inclusion in the CIA interrogation program—that is the only signal for the opening of an investigation.

That cannot signal the opening of an investigation without telling people that they cannot rely on Justice Department opinions.

Mr. SCHIFF. Mr. Mukasey, are you saying——

Mr. MUKASEY. Also——

Mr. SCHIFF. Mr. Mukasey—because I have a limited amount of time and I want to be very specific in my questions—are you saying that, even if you believe that the law was violated, you lack the power to open an investigation into that?

Mr. MUKASEY. If I believe that a particular practice is unlawful, then, if it is presented to me in concrete terms, I can take steps to say that it is unlawful, going forward.

Mr. SCHIFF. But we are presenting——

Mr. MUKASEY. But I——

Mr. SCHIFF. Mr. Attorney General——

Mr. MUKASEY. One comment that you made that is very portentous, and needs to be corrected, and that is the suggestion that so much as a line of what I said endangers American troops.

American troops fight in uniform——

Mr. SCHIFF. I understand that. I am not——

Mr. Attorney General, I am not trying to——

Mr. MUKASEY. The Geneva Conventions——

Mr. SCHIFF. I am not—yes, but it is my time. I would like to ask the question. And the Attorney General asked for a specific question.

I am not, in any way, trying to make equivocal—or equivalent—our troops in the field, and what Al Qaida is doing. Don't even go there, Mr. Attorney General.

But what I am saying is, if we don't establish a bright line, in this country, that we don't torture, then it makes it very hard for us to argue to other countries that they shouldn't torture our people, period.

And I would still like an answer to my question. Why doesn't the Attorney General of the United States have the power, notwithstanding a subordinate lawyer in the Office of Legal Counsel, to investigate whether a crime has been committed, if you believe that torture has been committed, in violation of the law?

Why wouldn't you have the power to investigate that?

Mr. MUKASEY. We have a bright line. We bar the torture. The evaluation of whether a particular practice constitutes torture could be presented to me only in a particular situation, namely, whether it was defined, part of a proposed program, in which case I would pronounce on it one way or the other, as I think I——

Mr. SCHIFF. And you think that is a bright line that we can hold up to the rest of the world, that it depends on whether it is part of a program authorized by an attorney in the Office of Legal Counsel?

Is that the standard we would ask the rest of the world to hold up?

Mr. MUKASEY. We have and do defend our position before the rest of the world. We have people in the State Department who do a superb job at that. And we will continue to do that.

Mr. SCHIFF. Does the definition of torture—if I can ask one last question, Mr. Chairman?

You have said, in your Senate testimony, that—I believe—that, if you were being waterboarded, you would consider it torture.

Does the definition of torture depend on who is being tortured or the circumstances in which they are being tortured?

Mr. MUKASEY. I said, in my Senate testimony, that it would seem like torture to me. I said that as part of a much larger amount of testimony that indicated, I think, quite clearly, that I would not use my own tastes and preferences as the basis for arriving at a legal determination about whether a practice that was actually put before me, in concrete terms, was or was not torture.

Mr. SCHIFF. Are you taking the position, Mr. Attorney General, that a practice which may be torture under certain circumstances is not torture under others, because either the information is desirable——

Mr. CONYERS. The time of the gentleman has expired. You may finish this question and get a response.

Mr. SCHIFF. Thank you, Mr. Chairman.

And the question is, are you taking the position that whether something is torture or not depends on who is being subjected to the technique and the desirability of the information?

Does it vary, or is there simply one standard which is governed by the nature of the coercion?

Mr. MUKASEY. The question of torture turns on what is in the torture statute, which does not speak, so far as I know, to the nature of the information. It speaks to the intent of the person imposing whatever it is that is claimed to be torture, and depends on other circumstances.

Mr. SCHIFF. I would only say, that is not a bright line, that I think any of us can apply.

Mr. CONYERS. The gentleman's time has expired.

The Chair will call for a 5-minute recess.

[Recess.]

Mr. CONYERS. The Committee will come to order.

The Chair recognizes Hank Johnson of Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Attorney General, it is good to have you here today.

The Web site, tpmmuckraker, which played an important role in providing information to the public concerning the U.S. attorney scandal, reveals that it has recently been removed from the Department of Justice's press release e-mail distribution list.

Has there been a change in the press release distribution list since you have become Attorney General?

Mr. MUKASEY. The short answer is I am not familiar with how the distribution list of press releases is arrived at.

I do know that all the press releases that we issue are on our Web site. So they should be generally available. But I am not familiar with——

Mr. JOHNSON. Have there been any names, any organizations taken off the list, to your knowledge, since you have become Attorney General?

Mr. MUKASEY. I do not know.

Mr. JOHNSON. So it was not you who made the decision to take this Web site, tpmmuckraker, off of the press release distribution list.

Mr. MUKASEY. I was not aware of it until it was called to my attention in a letter, I believe, from the Chairman.

Mr. JOHNSON. All right. Now, Mr. Attorney General, in your Senate testimony, you stated that you would not declare water boarding illegal because it would "tell our enemies exactly what they can expect."

Attorney General, can you answer the following question? Would it be lawful for an American interrogator to use the rack and screws during a critical interrogation?

Mr. MUKASEY. There is a line of hypotheticals that one could go down that would get to an indication to an enemy about what sort of thing we do and what sort of thing we don't do.

That is the reason and that is the only reason that I am not going to get into hypotheticals about what might or might not be permissible.

We have a classified program of interrogation that has gone through OLC opinions, that have been permitted by OLC opinions, and to which we adhere. Waterboarding was once part of that program. It is no longer. And that is all I can say.

Mr. JOHNSON. Well, let me ask you this. Would the use——

Mr. MUKASEY. People could go down the list of hypotheticals involving matters that are——

Mr. JOHNSON. You would never say that any of these strategies or interrogation techniques would be impermissible under any standard. Let us say the use of the electric shock as a harsh interrogation tactic. Would that ever be legal for us to employ?

Mr. MUKASEY. Once again, one could go down an entire list of hypotheticals that would indicate what goes on one side of the line and what goes on the other.

There are specific prohibitions against murder, rape, and other matters that are the subject of specific legislation, and, obviously, Congress could, if it chose, bar any specific practice and make it unlawful.

We can go down a list of hypotheticals all afternoon.

Mr. JOHNSON. All right. Well, I won't do that, but I will go at it from this standpoint.

Under what circumstances would it ever been permissible under international law to interrogate a U.S. citizen, a foreign—an enemy nation, to interrogate a U.S. citizen by strapping the U.S. citizen to a board and suffocating him or her with water, with the intent to create the fear of death?

When would that ever be permissible under international law?

Mr. MUKASEY. Once again, I am not going to go through a list of hypotheticals of what might be permitted or might not be permitted to us or anybody else, because to do so would indicate the contours of what may or may not be permitted under a program that is classified.

I understand that one can create an effect by doing that, but I am not going to respond to it.

Mr. JOHNSON. And this classified program is not for the eyes or ears of the Members of this Committee.

Mr. MUKASEY. To my knowledge, it is, it has been for the eyes and ears of the Intelligence Committee, which oversees the CIA, which administers the program.

Mr. JOHNSON. Well, let me ask you about the investigation of the abuse with respect to CIA tapes investigation.

Will you now expand the investigation into the CIA tapes destruction to inquire into the legality of the underlying interrogations?

Mr. MUKASEY. The progress of the CIA tapes investigation is entirely in the hands of the man who is conducting it, and that is John Durham.

Mr. JOHNSON. And he is a man that was hand-selected by you. He is a Department of Justice employee, career employee.

Mr. MUKASEY. He is a career prosecutor who was hired and compiled an enviable record long before I got here and is going to be here long after I leave.

Mr. JOHNSON. What guarantees would the American public have that Mr. Durham is not acting to please his employers, his boss, which would be you?

Mr. MUKASEY. John Durham, he doesn't report directly to me. He reports, as do other U.S. attorneys, to the Deputy A.G., who then reports up to me.

Mr. CONYERS. The gentleman's time has expired.

You may finish your response, General Mukasey.

Mr. MUKASEY. John Durham will do one of two things at the end of his investigation. He will either bring charges, which will necessarily be made public, or he will decline to bring charges, which I can't imagine would not be made public.

Mr. JOHNSON. Thank you, Mr. Attorney General.

Mr. CONYERS. The Chair recognizes Anthony Weiner, the distinguished gentleman from New York.

Mr. WEINER. Thank you, Mr. Chairman.

Attorney General, welcome.

One of the most noteworthy things about your ascension to Attorney General is, hopefully, it ends the partisanship and the sense of politicization of the agency, and I think you would agree that the agency, in Democratic and Republican administrations alike, is populated by extraordinary professional prosecutors and their support staff.

And it is very important that they are getting the message, hopefully, from you, that while we might disagree on things substantively and politically, the notion that the agency is on a path to getting back to a place to where it is viewed as a professional place, and there aren't political appointments being made, is something that is laudable.

And I think the message should go out that—and it has, I think, to your credit, that the days of political hiring are behind us. That doesn't mean our investigation would end, but I think it is important that that message be sent.

Mr. Attorney General, could I have your views on the COPS program? Was it a success?

Mr. MUKASEY. So far as I know, the COPS program has been a success in that it—in places where it was used as it was supposed to be used, i.e., as money that would encourage localities or would give localities the opportunity to try out certain configurations of their police force, would then be met with funds from those localities when they found that that was worthwhile.

To that extent, I believe it was successful.

Mr. WEINER. Was it a failure in any degree? What is your sense of the—what scenario that it didn't succeed?

Mr. MUKASEY. I don't know enough about it. I don't know of any program that has ever succeeded completely nor do I have any reason to believe that the COPS program was, in any sense, larger or significantly small, even, a failure.

Mr. WEINER. The reason I ask this is there seems to be some organizational schizophrenia within the Bush administration about the program, but Attorney General Ashcroft, for example, said it was one of the most important tools to drive down crime during the period that crime precipitously dropped in this country.

Democrats and Republicans alike, including the former Chairman, we passed an authorization, the first time it happened in a while, to the credit of the former leadership of this Committee, in a bipartisan way, we passed. The President signed it.

One of the things that he pointed to was the fact that the COPS program was being re-funded.

And then we, year after year, open up the budget and the folks at OMB zero out the program. And so it seems that there is an internal debate going on within the Administration.

On one hand, there are people are like yourself and others who have sat in that seat who have said the program is a success, and then there are the precipitous drops in the funding to the point where it is basically zero for the hiring component now.

But would I put you in the camp with the President and John Ashcroft to say that this is a program that we should try to figure out ways to save or is this—or do you believe that the zeroes that are in the budget reflect what the policy is now of the Administration and believe the COPS program should be allowed to expire?

Mr. MUKASEY. I don't think I should be put to a choice between one camp or the other camp when it comes to a specific program. What I have tried to do and what I think others at the department are trying to do is to approach the underlying problem that is addressed by the COPS program and a whole lot of others, including the Safe Streets program and a whole lot of other programs, and that is to cut down crime and to approach it in a coherent way.

When we fund a center that gathers gang information and disseminates it to the local communities and thereby allows them to meet that particular kind of crime, we act in a way that, to a certain extent, diminishes the need for other——

Mr. WEINER. Yes, but you will forgive me. I don't know what program the Justice Department can possibly implement that diminishes the need for cops on the street, right? I mean, I think people agree.

Are you familiar with the record of former Mayor Rudolph Giuliani?

Mr. MUKASEY. I am familiar with part of it. I am not an expert on it.

Mr. WEINER. Are you familiar with the good parts? Not talking about the bad parts.

Mr. MUKASEY. I am familiar with some of the good parts and some of the good parts of the record of his predecessor.

Mr. WEINER. The reason I mention it tongue in cheek is that it was Mayor Giuliani, a Republican, who was successful in driving down crime, credited the ability to do that with the influx of Federal dollars that allowed about 7,000 additional cops to be hired in New York City.

I don't think that Mayor Giuliani or Bill Clinton or your predecessor would say that one program necessarily works alone, but the fact of the matter is the Administration has said zero dollars and zero cents would go to hiring police officers in this budget.

And I am just trying to get a sense from you whether that is something you are going to join us and to try to change or whether you are going to be an advocate for that philosophy.

Mr. MUKASEY. I am going to try to focus the money where it can best be used. I agree that there are some realities of the budgeting process that result in money not being provided for in a budget, being put in by Congress and so on.

A lot of that is way beyond me, I am new to this, and, to a certain extent, above my pay grade. That said, I agree that you need cops to fight crime.

Mr. WEINER. And I thank you for being here. In case you hadn't checked your initiation manual, you get one hearing to say "I am new here." So the next time, you will lose that cover.

But thank you for your time.

Mr. CONYERS. Thank you, sir.

The Chair is pleased to recognize Artur Davis, himself a former assistant U.S. attorney, from Alabama.

Mr. DAVIS. Thank you, Mr. Chairman.

General Mukasey, welcome.

Let me, as we conclude today, let me turn to a subject that has, frankly, not come up. It is the question of political influence or possible political influence over prosecutions.

There have been three instances in the last year when this Committee has received sworn testimony regarding the possibility that there were political considerations brought to bear around charging decisions by local U.S. attorneys.

In my state, I represent the state of Alabama, a woman, who happens to be a Republican, testified under oath before the Committee staff in private session and provided a sworn affidavit to the Committee.

She alleged that she was present during a conversation in which Republican political operatives discussed the viability of prosecuting or the desirability of prosecuting the governor of Alabama, whom they happened to be locked in a political contest with.

She also said in her sworn testimony that she was told on another occasion that the former deputy chief of staff to the President, Mr. Rove, had contacted senior officials of the Department of

Justice and spoken about the desirability of prosecuting the former governor of Alabama.

This Committee also heard sworn testimony from David Iglesias, who is United States attorney in New Mexico, who asserts that a Member of the United States Congress and a Member of the United States Senate both contacted him to inquire about the status of ongoing investigations and to question whether sealed indictments might be unsealed in time to shape the November 2006 elections.

And, finally, John McKay, formerly the United States attorney in Seattle, Washington, testified before this Committee that he received a phone call from the chief of staff to a Member of Congress questioning about whether he, McKay, intended to bring a particular prosecution.

I understand that you have not had an opportunity to make an assessment of whether the claims are accurate or not, but I want to pose this set of questions to you.

Can you think of any instance, based on your knowledge of the law, in which it would be appropriate for a political operative to urge that a U.S. Attorney prosecute someone?

Mr. MUKASEY. I can't conceive of any circumstance in which it would be appropriate for the U.S. attorney to have such a conversation.

Mr. DAVIS. Can you conceive of any circumstance in which it would be appropriate for a United States Senator to pick up the telephone and ask a U.S. attorney about the status of an investigation?

Mr. MUKASEY. Once again, I can't conceive of any circumstance in which it would be proper for the United States attorney to respond to any inquiry from any political figure about the bringing or the withholding of a prosecutor's decision.

Mr. DAVIS. Can you think of any instance in which it would be appropriate for the deputy chief of staff, who had no legal counsel responsibilities under President Bush, can you think of any circumstance in which it would be appropriate for that individual to have contacted senior officials at the Department of Justice to urge the prosecution of a former governor?

Mr. MUKASEY. I have issued guideline with regard to contacts——

Mr. DAVIS. Just answer that question as you answered the others. Can you think of any instance of appropriateness regarding that scenario?

Mr. MUKASEY. There is a limited number of people, limited to a very small number——

Mr. DAVIS. I understand that and I will get that, but just so we can follow the line of questions, can you think of any instance in which it would be appropriate for a deputy chief of staff to inquire of a senior official about the status of a case?

Mr. MUKASEY. I can't think of a circumstance in which it would be appropriate for a senior official to respond to an inquiry of that sort with information about whether a prosecution is going forward or not going forward.

Mr. DAVIS. So given those statements, General, given that the allegations have been made under oath before the Committee in all

three instances, the first question, how much would it concern you if all three of these sworn statements were true?

Mr. MUKASEY. I can't quantify my level of concern. What I can tell you——

Mr. DAVIS. Would it be a high level of concern?

Mr. MUKASEY. I don't think that it is appropriate for United States attorneys to be talking to political people about——

Mr. DAVIS. So given that—and I am pushing you because our time is limited. Given that, what steps have you taken to determine whether the claims of the Alabama lawyer or Mr. Iglesias or Mr. McKay are accurate?

Mr. MUKASEY. The case involving the Alabama lawyer is, I believe, sub judice before a circuit court and——

Mr. DAVIS. But you understand that that is not a subject of the appeal. That is in no way the subject of what is being raised in the appeal.

The question of whether there were improper contacts——

Mr. MUKASEY. That is an interesting point, because as far as I know, there has been no request for a remand.

Mr. DAVIS. Well, but what I am asking you, sir—if I can just have an answer to my question, Mr. Chairman.

What steps have you taken in any of those three instances to determine whether or not the—because you have stated that all three would raise serious concern. You have stated that all three, if so, would be improper.

As the current Attorney General, what steps have you taken to see if these improprieties, in fact, happened, sir?

Mr. MUKASEY. I have limited myself to the participation of the people on the other end of the telephone calls, and I have not made direct inquiry as to whether those instances occurred or what those responses were.

I have made clear——

Mr. DAVIS. Given your concerns, why not?

Mr. MUKASEY. I have made clear to the department that it is not proper for anybody——

Mr. DAVIS. But if it happened in the past, General—if he can answer my question, Mr. Chairman.

Given that this may have happened in the past, given the allegations that have been made under oath before this Committee in public and private testimony, given that two of those allegations have been repeated before the U.S. Senate, given that you think it is inappropriate that these events happened, what steps have you taken to determine whether or not they occurred?

Mr. MUKASEY. If any impropriety or any lapse of proper standards was engaged in by any United States attorney, that would be a subject initially for the Office of Professional Responsibility.

Mr. DAVIS. Has the OPR conducted an investigation?

Mr. CONYERS. The gentleman's time has expired.

Before we conclude this hearing, General Mukasey, on behalf of the Committee, I express our deep appreciation of your first appearance. It has been a lengthy one. I can assure you that the next one will not be as long, but it will be as equally important.

We are going to go through the record and examine, each of the more than 30 Members, what they want to focus on next time.

It seems to me that because of the importance of your work and our responsibility, that if there are ways that we can advise you of the areas that we want to work in before you get here, so that this isn't some kind of a pop quiz, we think that it would be more productive for all of us.

And in that spirit, I thank you not only for what you have done and your cooperation, but what we have to do the rest of the year.

Ms. JACKSON LEE. Mr. Chairman, may I put a unanimous consent request in the record?

Mr. CONYERS. We would like to continue this relationship and I would also like to give, without objection, every Member 5 legislative days to add anything they wish to the record, as well as you.

So I yield to the gentlelady from Texas for a unanimous consent request.

Ms. JACKSON LEE. I thank the gentleman.

I want to put into the record a letter to the Attorney General regarding the status of the DNA lab in Harris County and the district attorney's office, and a letter regarding the treatment of imams at the Nation's airports and H.R. 4545.

Mr. CONYERS. Without objection, so ordered.

And the Committee is adjourned.

[Whereupon, at 3:21 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for your leadership in convening today's very important hearing on the oversight of the Department of Justice. I would also like to thank the ranking member the Honorable Lamar S. Smith, and welcome our extremely distinguished witness, the Attorney General of the United States, the Honorable Michael Mukasey. Welcome Mr. Attorney General.

In addition to holding the seat of my hero, role model, and predecessor, the incomparable Barbara Jordan, one of the reasons that I have been so proud to be a member of the Committee on the Judiciary throughout my six terms in Congress is that this Committee has oversight jurisdiction over the Department of Justice, which I have always regarded as the crown jewel of the Executive Branch.

In recent years the reputation of that Department, which has done so much to advance the cause of justice and equality for all Americans, has been tarnished. And that is putting it charitably. This Committee has no greater challenge and obligation to the nation than to help restore the Department of Justice to its former greatness.

Anyone who has observed this Committee over the years knows that I have a deep and abiding passion about the subjects within its jurisdiction: separation of powers, due process, equal justice, habeas corpus, juvenile justice, civil liberties, antitrust, and intellectual property. But, Mr. Chairman, today I wish to focus on the record and performance of the Department of Justice in five areas: (1) the Department's civil rights record; (2) the on-going investigation into the firing of the 8 United States Attorneys in December 2006; (3) the CIA's destruction of tapes recording terrorist suspect interrogations; (4) the enforcement of U.S. federal laws to protect U.S. contractors in Iraq; and (5) the various cuts in the 2009 fiscal year budget. Allow me to describe my substantial concerns and the responses I hope to hear from the Attorney General.

CIVIL RIGHTS ENFORCEMENT

Mr. Chairman, the Department of Justice is the nation's largest law enforcement agency and it is no exaggeration to state that its Civil Rights Division used to be the nation's largest civil rights legal organization. It wields the authority and the resources of the federal government on difficult and complex issues and has helped bring about some of the greatest advances for civil rights. However, the Department's record under this Administration indicates that it is not living up to its tradition of fighting for equal justice under law.

The Bush administration has abdicated its responsibility to enforce the nation's most critical laws. Since January 20, 2001, the Bush Administration has filed 46 Title VII cases, an average of approximately 6 cases per year. In contrast, the prior Administration filed 34 cases in its first two years in office alone, and 92 in all, for an average of more 11 cases per year.

Furthermore, upon examining the types of cases prosecuted by the Department, an even more disturbing fact is revealed, the failure of the Department to bring suits that allege discrimination against African-Americans. According to CRS statistics from May 2007, there were 32 Title VII cases brought by the Bush Administration. Of those, 9 were pattern or practice cases, 5 of which raised allegations of race discrimination but only one case—1 case—involved discrimination against African Americans. In contrast, the Clinton Administration filed 13 pattern or practice cases, 8 of which involved racial discrimination.

The record is not much better when it comes to the subject of voting rights enforcement. After six years, the *Bush Administration has brought fewer Section 2 cases, and brought them at a significantly lower rate, than any other administration since 1982.*

The Voting Section filed a total of 33 involving vote dilution and/or other types of Section 2 claims during the 77 months of the Reagan Administration that followed the 1982 amendment of Section 2. Eight (8) were filed during the 48 months of the first Bush Administration and 34 were filed during the 96 months of the Clinton Administration. To date, only 11 have been filed so far during the present Bush Administration.

Additionally, Mr. Chairman, most of the Department's major voting-related actions during this Administration have been beneficial to the Republican Party, including two in Georgia, one in Mississippi and the infamous redistricting plan in Texas, which the Supreme Court struck down in part. For years we have heard stories of current and former lawyers in the Civil Rights Division alleging that political appointees continually overruled their decisions and exerted undue political influence over voting rights cases. Indeed, one-third of the Civil Rights Division lawyers have left the department and the remaining lawyers have been barred from making recommendations in major voting rights cases.

Mr. Chairman, the Justice Department's recent record is deplorable when it comes to enforcement of the federal criminal civil rights law. According to an analysis of Justice Department data by the *Seattle Post-Intelligencer*, civil rights enforcement no longer appears to be a top departmental priority. An analysis of the data reveals that, between 2001 and 2005, the number of federal investigations targeting abusive police officers declined by 66 percent and investigations of cross-burners and other purveyors of hate declined by 60 percent.

It appears that this downward trend accelerated after the tragic events of 9/11. While there has been a slight increase in enforcement related to human trafficking, which is classified under civil rights, not enough has been done to stop the overall slide.

I am very troubled by this trend. Hate-crimes are too dangerous to ignore, and there is social value in effective federal review of police misconduct. There has been an increase in hate crimes recently, especially with the placement of nooses in public places to instill fear in the hearts and minds of many Americans.

I am also troubled by the recent "Jena Six" case where six black youths attending Jena High School in Jena, Louisiana were arrested and some were initially prosecuted as adults in response to several fights that ensued following white students' hanging a noose on school grounds. Although black students were arrested and jailed, no white students were ever arrested in connection with the incidents. As you will recall, I worked tirelessly with civil rights activists such as Reverend Jesse Jackson and Reverend Al Sharpton to ensure that the Department play its role in ensuring that Justice is wrought. I implore the Attorney General to continue to conduct an investigation into this matter and to make the Department's findings a matter of public record. Since the Jena 6 incident, there have been numerous high profile incidents of noose hangings, including one found in a black Coast Guard's bag, one on a Maryland college campus, and on the office door of a black professor at Columbia University in New York, just to name a few. Equally astonishing is the fact that there is no federal application of hate crimes law to noose hangings. I am anxious to hear the Attorney General's responses to these serious problems.

TEXAS JUVENILE AND OTHER CORRECTIONS FACILITIES

Mr. Chairman, another area of concern that I wish to discuss concern the care and protection of juvenile offenders in state correctional facilities and the care and safety of those being held in custody in county and municipal jails in Texas and around the country.

In my home state of Texas, certain administrators and officials, past and maybe current, of the Texas Youth Commission (TYC) have obviously neglected their duties. According to published reports and investigations, several TYC administrators abused their authority by pulling young boys out of their dorm rooms and classrooms and sexually molesting them. The allegations of abuse have been a matter of public record since 2000. In 2005, an investigation conducted by the Texas Rangers revealed that employees of the juvenile facility in Pyote, Texas, had repeated sexual contact with juvenile inmates.

Additionally, several members of the TYC board, who are responsible for the oversight of TYC facilities, admit that they were aware of the finding in the report prepared by Texas Rangers but took no corrective action. The current scandal surrounding TYC is scandalous and outrageous; quite frankly it sickens me. The situa-

tion within the TYC disregards every notion of justice and will contribute to the rise of recidivism rates if it is not arrested immediately.

Let me turn to another horrifying area of inmate abuse. Between January 2001 and January 2006, at least 101 persons, an average of about 17 a year, have died while in the custody of the Harris County Jail, located in Houston, Texas. In 2006 alone there were 22 deaths. I find it especially disturbing that of the 101 deaths, at least 72 of the inmates were awaiting court hearings and had yet to be convicted of the crimes for which they were taken into custody.

In our system every accused person is entitled to life, liberty, and the pursuit of happiness, and a presumption of innocence. These 72 individuals, however, were deprived of their life without the due process guaranteed by the Constitution. They will not ever receive their day in court to be judged by their peers because of the irresponsibility, incompetence, indifference, and perhaps the criminal neglect, of the jail officials to whose care they were entrusted.

I believe the situation in the Harris County Jail System requires national attention. When it is alleged that inmates are sleeping on the floor next to toilets and denied basic medical care, something must be done. The conditions at these jails border on cruel and unusual punishment. Should fault or wrongdoing be found, the persons responsible should be held accountable. Seeing that such authorities are held accountable is ultimately the responsibility of the United States Department of Justice. I am interested to hear the Attorney General's views on these matters.

U.S. ATTORNEY FIRINGS

Mr. Chairman, I would also like to discuss the issue of the on-going investigation into the U.S. attorney firings in 2006. We have found that it is rare for a United States Attorney to *prematurely end* his or her four-year term of appointment. According to the Congressional Research Service, only 54 United States Attorneys between 1981 and 2006 did not complete their four-year terms. It has now been confirmed that at least eight United States Attorneys were asked to leave the Department in December 2006.

On March 6, 2007, the Subcommittee on Commercial and Administrative Law held a hearing entitled, "H.R. 580, Restoring Checks and Balances in the Confirmation Process of United States Attorneys." Witnesses at the hearing included six of the eight former United States Attorneys and William Moschella, Principal Associate Deputy Attorney General, among other witnesses.

Six former United States Attorneys testified that he or she was not told in advance why he or she was being asked to resign. Upon further inquiry, however, several of the terminated U.S. attorneys were advised by the then Acting Assistant Attorney General William Mercer that they were terminated essentially to make way for other Republicans to enhance their credential and pad their resumes.

It is now clear that the manifest intention of the proponents of the provision in the USA PATRIOT ACT Reauthorization regarding the appointment of interim U.S. Attorneys was to allow interim appointees to serve indefinitely and to circumvent Senate confirmation.

We now know that after gaining this increased authority to appoint interim U.S. Attorneys indefinitely, the Administration has exploited the provision to fire U.S. Attorneys for political reasons. A mass purge of this sort is unprecedented in recent history. The Department of Justice and the White House coordinated this purge. The purge was conducted based in large part on whether the U.S. Attorney "exhibit[ed] loyalty to the President and Attorney General."

Mr. Chairman, the office of the United States Attorney traditionally operated with an unusual level of independence from the Justice Department in a broad range of daily activities. The practice that was in place for less than two years needed to end. That is why I was proud to have voted for its repeal and the restoration of the status quo ante. Mr. Attorney General, I welcome your views on the investigation into the US attorney firings and your views on the Department's political independence from the Administration.

DESTRUCTION OF CIA INTERROGATION TAPES

Mr. Chairman, I am extremely concerned by the recent revelation that tapes of CIA interrogations have been destroyed, and the reports this week that the CIA has engaged in the practice of waterboarding.

There are media reports that at least four top White House lawyers were involved in the discussions within the CIA about the destruction of these tapes, which depict the interrogation of prisoners by U.S. intelligence agents, raise crucial questions about possible criminality, violation of federal laws and international treaties, and obstruction of justice. I am extremely concerned by the implications of these crimi-

nal allegations, as well as our oversight responsibilities, as a Congress, to properly investigate this case and to ensure that similar events do not occur in the future.

In early December, media reports indicated that, in 2005, the CIA destroyed at least two videotapes. The tapes in question are known to have documented the interrogation of two senior al-Qaeda operatives in CIA custody. According to reports, the tapes showed CIA agents subjecting terrorism suspects to severe interrogation techniques, including the controversial practice of waterboarding. After the destruction of the tapes was revealed, CIA director General Michael Hayden stated that the decision to destroy them was made "within the CIA," to protect the safety of undercover officers. According to current and former intelligence officials, the decision is ultimately attributable to Jose Rodriguez, Jr., who was head of the Directorate of Operations.

Mr. Chairman, the 2005 destruction of these tapes came in the midst of Congressional scrutiny of the CIA's detention and interrogation programs. This raises significant concerns about whether the CIA withheld information from Congress, as well as other entities including the federal courts and the September 11th Commission. It has been suggested that the tapes were destroyed in order to eliminate evidence of potentially criminal activity. In light of the controversy, the Department of Justice initiated an investigation, and, on December 14th, moved to delay Congressional inquiries into the CIA's destruction of the tapes, stating that such a parallel investigation would jeopardize the Department's efforts to investigate the issue.

Mr. Chairman, the Department of Justice itself, having offered legal advice relating to the destruction of the tapes, could be implicated in this investigation. In addition, at least four top White House lawyers—Alberto Gonzales, David S. Addington, John Bellinger III, and Harriet Miers—were involved in discussions regarding the tapes in question. The destruction of the tapes has raised concerns about both the possibility that the tapes documented unlawful conduct and that their destruction was itself unlawful.

Mr. Chairman, since 9/11, this Administration has consistently questioned the applicability of the Geneva Conventions and the Convention Against Torture to the war on al-Qaeda. While I certainly believe in the necessity of protecting the United States from potential future terrorist attacks, I firmly believe that these international conventions and agreements are not optional; they can not be applied only when it is convenient for the Bush Administration. If the United States is to truly be a leader in promoting human rights and the rule of law, it must apply these standards to its own policies and practices.

In the Supreme Court case *Hamdan v. Rumsfeld*, the Court held that Article 3 of the Geneva Conventions does apply to the conflict with al-Qaeda, contrary to numerous assertions to the contrary made by the Bush Administration. The United States has long-since ratified all four Geneva Conventions, all of which contain Article 3, which prohibits, among other things, "cruel treatment and torture," "outrages upon personal dignity," and "humiliating and degrading treatment" of prisoners or civilians during armed conflict. Either we must apply the same standards to our own conduct, or else risk the likelihood that other nations will not adhere to these standards when detaining and interrogating our citizens.

Mr. Chairman, all detainees must be treated in accordance with international law as well as the U.S. Constitution, under which we all serve. The United States *must not* make those practices, long the staple of abhorred foreign dictators, part of its own interrogation arsenal. While torture is expressly prohibited by international and domestic law, the Administration has consistently sought to circumvent such restrictions, citing the necessity of the situation and seeking to narrowly define torture.

In addition to possible illegal conduct portrayed on the tapes, the destruction of the tapes has raised separate legal concerns. Title 18, United States Code, Section 1512 (c)(1) and (2) establishes the illegality of tampering with a record "with the intent to impair the object's integrity or availability to use in an official proceeding." The official proceeding need not be actually pending at the time of the acts of obstruction, though it must be foreseeable.

Mr. Chairman, I believe it is our responsibility, as the representatives of the American people, the guardians of the Constitution, and the bastion of America's civil liberties, to be unwavering in our commitment to preserving the rights of the American people and American way of life. I firmly believe that acts of torture represent a grave breach of American values.

ENFORCEMENT OF U.S. FEDERAL LAWS TO PROTECT U.S. CONTRACTORS IN IRAQ

In December 2007, the Crime Subcommittee held a hearing in December on the enforcement of U.S. federal criminal laws to protect U.S. contractors in Iraq. The

hearing was held to address the rape of Jamie Leigh Jones by U.S. contractors employed by KBR/Haliburton. The Department sent no witnesses to the hearing because it indicated that it was investigating the matter and has failed to respond to several letters issued by the Committee in January.

Jamie Leigh Jones, from my hometown of Houston, Texas, testified that in July 2005, she was approximately 20 years old, and was on a contract assignment in Iraq for KBR/Haliburton, when her fellow male contractors drugged, imprisoned, and repeatedly gang-raped her.

The Department has brought no criminal action against the alleged assailants. Despite claims to the contrary Title 18, Part I, Chapter 1, Section 7, of the United States Code, entitled "Special maritime and territorial jurisdiction of the United States defined," the United States has jurisdiction over the following: "any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States" does allow for the Department to prosecute Ms. Jones's alleged assailants.

Mr. Chairman, I call for a complete *and entirely transparent* investigation into the recent discovery of the destruction of the CIA tapes, and we must fully investigate all incidents of suspected torture by U.S. officials and agents.

FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

Chairman, this year this Committee examined legislation that was intended to fill a gap in the Nation's intelligence gathering capabilities identified by the Director of National Intelligence Mike McConnell, by amending the Foreign Intelligence Surveillance Act, FISA. But in reality it eviscerates the Fourth Amendment of the Constitution and represents an unwarranted transfer of power from the courts to the Executive Branch and the Attorney General.

I am aware of the delicate balance that the Department must tread in protecting homeland security and in affording Americans their full and unfettered rights under the Bill of Rights. The original law protected the civil liberties of all Americans while also granting the President the tools needed to conduct an aggressive campaign against terror. FISA does not make American any safer—rather it allows the Government to pursue an enormous and untargeted collection of international communications without court order or meaningful oversight by either Congress or the courts. As such the recent legislation requesting an extension of FISA is an affront to our values and consequently, the bill must be allowed to die rather than be extended for one more day. These revisions of FISA legislation should not be supported for several reasons.

First, it allows the Attorney General to issue program warrants in international calls without court review. This removes the FISA court, which has overseen the process for 30 years and instead places the Attorney General in charge of determining the legitimacy of surveillance.

Secondly, it includes no provisions to prevent "reverse targeting," the practice whereby surveillance is conducted on a foreign person to hear their conversations with person in the United States who is the actual target. Under the FISA amendments, these conversations can be heard, recorded and stored without warrant.

Lastly, the FISA amendment reduces the oversight capabilities of Congress by requiring the Attorney General to provide Congress only the information the Justice Department sees fit to report. This removes an important check upon America's surveillance program.

Because I recognize that there is a delicate balance between legitimate intelligence needs and the civil rights of American citizens, I was proud to support the RESTORE Act, passed by this House in mid-2007. Mr. Chairman the Jackson-Lee Amendment added during the markup made a constructive addition to the RESTORE Act by laying down a clear, objective criterion for the Administration to follow and the FISA court to enforce in preventing "reverse targeting." "Reverse targeting" is the practice where the government targets foreigners without a warrant while its actual purpose is to collect information on certain U.S. persons. I introduced the Jackson-Lee Amendment to eliminate the reverse targeting by requiring the Administration to obtain a regular, individualized FISA warrant whenever the "real" target of the surveillance is a person in the United States. It is imperative that the rights enshrined in the Bill of Rights be given effect. Mr. Attorney General, I welcome your comments on this issue.

THE 2009 FISCAL YEAR BUDGET

Mr. Chairman, the third and final area I wish to discuss concern the reductions in the 2009 fiscal year budget. A review of the Administration's FY 2009 budget reveals drastic cuts to state and local law enforcement. The Administration has re-

quested a total of $404 million where Congress last year appropriated over $1.7 billion dollars. This is particularly distressing given that violent crime increased in 2005 and 2006 for the first time in a decade, which many believe are a consequence of similar cuts the President proposed in the past. President Bush's budget eliminates critical anti-crime and anti-terrorism funding for local law enforcement. The Bush budget cuts $137 million from aid to states and localities for bioterrorism preparedness. Additionally, President Bush did not ask for any funding for the Edward Byrne Memorial Justice Assistance Grant program, nor for the Clinton-era Community Oriented Policing Services (COPS) program, among others. The Byrne program received $175 million in fiscal 2008; COPS received $251 million. These cuts will further erode the ability of state and local government to fight crime at a time when states are dealing with budget crises. Prevention and control of crime is critical to ensuring the strength and vitality of our Nation.

I am interested to hear the Attorney General's views on these matters. Again, thank you Mr. Chairman for holding this hearing. I yield the remainder of my time.

PREPARED STATEMENT OF THE HONORABLE DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Thank you, Mr. Chairman. I appreciate this opportunity to hear from Attorney General Michael Mukasey regarding his vision for the Department of Justice and the state of the Department which he inherited.

I frequently took opportunities such as this hearing to question Attorney General Mukasey's predecessors on the need for increased prosecution of human smugglers and other criminal aliens. I have encouraged the President, multiple attorney generals, and the U.S. Attorney for the Southern District of California for years to prosecute more "coyotes" and criminal aliens. I have also sought and won appropriations specifically for this purpose.

I am heartened to read in Attorney General Mukasey's testimony that the President's budget includes $7,000,000 for this purpose, and that these funds will be used in part to fund 40 additional U.S. Attorneys in border districts. "Coyotes" and other criminal aliens are some of the most dangerous individuals in the United States, and it is terribly important to confront them head on.

I look forward to hearing from Attorney General Mukasey on how the Department of Justice will continue down the path of increased criminal alien related prosecutions under his lead, as well as the myriad of other issues within the Department's jurisdiction.

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, COMMITTEE ON THE JUDICIARY

The last year has brought to light numerous abuses at the Department of Justice (DOJ). From the suspicious terminations of nine U.S. Attorneys to evidence of possibly politically motivated prosecutions, the politicization of the hiring process for career DOJ attorneys, the sharp decline in civil rights enforcement, and the revelation of the existence of secret legal memoranda justifying the use of torture, the DOJ reached a low point in its history and ended 2007 with its reputation for professionalism and integrity tarnished. With a change in the leadership of the DOJ, I hoped that these abuses would be properly addressed.

I am appreciative of Attorney General Michael Mukasey's stated intention to establish a more cooperative relationship between the DOJ and Congress. I also recognize that he has taken some positive steps towards reducing the risk of politicization of federal law enforcement, including instituting guidelines that limit contact between DOJ and White House officials concerning ongoing Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Committee on the Judiciarycivil and criminal investigations. Nonetheless, many questions remain concerning the DOJ's role in justifying the use of harsh interrogation techniques that I believe amount to torture, its continued defense of overweening executive authority, and its level of cooperation with ongoing Congressional and internal investigations of its conduct. I call upon Attorney General Mukasey to be forthcoming on these issues.

LETTERS DATED FEBRUARY 7, 2008, FROM THE HONORABLE SHEILA JACKSON LEE TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

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MIDDLE EAST AND SOUTH ASIA
SENIOR WHIP
DEMOCRATIC CAUCUS
CHAIR
CONGRESSIONAL BLACK CAUCUS
CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

February 7, 2008

Attorney General Michael Mukasey
United States Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Mukasey:

I am writing to request that you take immediate action to ensure a thorough and complete federal investigation into the serious allegations made against District Attorney Chuck Rosenthal of Harris County, Texas, regarding the misuse of government resources and sending of pornographic, racist, and political messages.

On numerous occasions, District Attorney Rosenthal has engaged in conduct that has been criticized as questionable, embarrassing and improper while in office. The fact that Rosenthal's official computer contained dozens of offensive and inappropriate e-mails is a shocking lapse of discretion and lack of responsibility, especially for one of the state's top elected officials. Mr. Rosenthal is alleged to have repeatedly sent racist and sexual emails, and his actions and the cases which he prosecuted need to be reviewed for prosecutorial misconduct and abuse, especially as it relates to the removal of black jurors. Furthermore, an investigation into the Houston Police Department's crime lab revealed that bad management, under-trained staff, false documentation, and inaccurate work has cast doubt on thousands of DNA based convictions. Investigators raised serious questions about the reliability of evidence in hundreds of cases they investigated and asked for further independent scrutiny and new testing to determine the extent to which individuals were wrongly convicted with faulty evidence. However, Mr. Rosenthal rejected the recommendation of the appointment of a special official to oversee the investigation of these cases.

I believe that we have an obligation as Members of Congress and the Judiciary Committee to do all in our power to prevent all forms of racism and bias, especially among prosecutors, who are the very entity entrusted with representing the state and ensuring the preservation of equality and justice in the administration of justice. It is unfathomable that District Attorney Rosenthal has been charged with the preservation of the very laws which he has violated and over which we have oversight.

Thank you in advance for your consideration of this issue. I look forward to working with you to improve the administration of our criminal justice and judicial system and the expeditious handling of this matter. I know you share my commitment to ensuring that our nation's prosecutors epitomize the ideals of equality under the law enshrined in our Constitution.

Very Truly Yours,

Sheila Jackson Lee
Member of Congress

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February 7, 2008

The Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Mukasey:

It has come to our attention that, on November 20, 2006, at the Minneapolis-St. Paul International Airport, violations of religious liberties, the First Amendment, the Fourth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), 49 U.S.C. § 40127(a) (prohibiting discrimination in air transportation on the basis of race, religion and national origin) and 49 U.S.C. § 41705 (prohibiting discrimination in air transportation on the basis of disability) may have occurred. As such, the undersigned hereby request that the Department of Justice launch an investigation into the events surrounding:

- The removal of Ahmed Shqeirat, Mohamed Ibrahim, Didmar Faja, Omar Shahin, Mahmoud Sulaiman and Marwan Sadeddin (hereinafter "the Six Imams[1]") from U.S. Airways Flight 300 by US Airways' employees and the Minneapolis Airport Police;
- The subsequent arrest, detention and interrogation of the Six Imams by the Minneapolis Airport Police; and
- U.S. Airways' refusal to service these men after they were cleared of any wrongdoing.

According to the Six Imams legal complaint, on November 20, 2006, the Imams checked in for their flight at the Minneapolis-St. Paul International Airport and passed through security without incident. Before boarding, some of the Imams decided to pray Maghreb, the early evening/dusk Muslim prayer, in the waiting area

[1] An Imam is a Muslim religious leader. He is the person who leads congregational prayer in the mosque.

of the terminal. Shortly thereafter, the Six Imams boarded the plane and sat in their pre-assigned seats. Thirty minutes later, three airport police officers boarded the plane, approached the Six Imams one by one and demanded that they deplane. The Six Imams complied with this request. The Six Imams were then searched, arrested and handcuffed. The Federal Bureau of Investigation and the Secret Service interrogated the Imams. The interrogations revealed that the Imams posed no security risk whatsoever. Nevertheless, US Airways refused to re-book the Six Imams on a flight.

Although some have questioned the validity of the Six Imams' claims, a federal Judge recently held that the Imams have sufficiently pled claims of discrimination. Shqeirat v. U.S. Airways Group, Inc., 2007 U.S. Dist Lexis 85881, No. 07-1513 (D. Minn. November 20, 2007). The Honorable Ann Montgomery of the United States District Court of Minnesota rejected almost every argument set forth by US Airways and the Airport Police Department in pre-trial motions. She stated that the facts as pled by Plaintiffs "could support an inference that Plaintiffs' race and religion were motivating factors in MAC's [Airport Police] decision to arrest Plaintiffs." Id. at 26. Furthermore, she ruled that it was "dubious" that the events as set forth by Defendants "would lead a reasonable person to conclude that Plaintiffs were about to interfere with the crew of Flight 300". Id. at 22.

US Airways attached several documents to their motion for summary judgment which demonstrated that the Imams' race, national origin and religion were the motivating factors behind US Airways' decision to remove the Imams from the plane and to deny them any service. The documents revealed that the impetus for deplaning the Imams was a hand written note from a passenger to the pilot stating that the Imams were praying prior to boarding the plane. Furthermore, the Airport Police Department blindly acted upon the information provided by US Airways instead of conducting their own independent investigation to determine whether probable cause existed to arrest the Imams. In Court, the Police Department's representative admitted that the Six Imams were arrested due to their political views.

Such conduct raises several issues of federal interest. First, Defendants' conduct may have violated several Constitutional Amendments, including the Fourth Amendment and the First Amendment. Defendants' conduct also may have violated several federal civil rights statutes including Title VI of the Civil Rights Act of 1964. Furthermore, an inquiry by the Department of Justice is of special need in relation to 49 U.S.C. § 40127(a) (prohibiting discrimination on the basis of race and religion in air transportation) and 49 U.S.C. 41705 (prohibiting discrimination on the basis of disability in air transportation) because the statutory schemes of these provision either prohibit or greatly limit private causes of action.

Religious liberty lies at the bedrock of our society. The manner in which these religious leaders were treated raises several concerns. For the forgoing reasons, we

request a meeting to discuss further an investigation into these incidents and possible action against US Airways and MAC. Enclosed please find a full memorandum of law which sets forth the need for such an investigation.

Thank you in advance for your consideration of this issue. I look forward to working with you to improve the administration of our judicial system and the expeditious handling of this matter.

Very Truly Yours,

Sheila Jackson Lee
Member of Congress

I

110TH CONGRESS
1ST SESSION

H. R. 4545

To target cocaine kingpins and address sentencing disparity between crack and powder cocaine.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 13, 2007

Ms. JACKSON-LEE of Texas (for herself, Mr. CLYBURN, Mr. SHAYS, Mr. LEWIS of Georgia, Mr. TOWNS, Mr. DAVIS of Illinois, Mr. SCOTT of Georgia, Mr. JEFFERSON, Mr. WYNN, Mr. ELLISON, Ms. LEE, Mr. SERRANO, Mr. RUSH, Ms. NORTON, Mr. BRADY of Pennsylvania, Mr. CUMMINGS, Mr. FATTAH, Mr. GRIJALVA, Mrs. CHRISTENSEN, Ms. CLARKE, Mr. BISHOP of Georgia, Mr. PAYNE, Mr. MEEKS of New York, and Mr. COHEN) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To target cocaine kingpins and address sentencing disparity between crack and powder cocaine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Cocaine base (commonly known as "crack cocaine") is made by dissolving cocaine hydrochloride (commonly known as "powder cocaine") in a solution of sodium bicarbonate (or a similar agent) and water. Therefore, crack and powder cocaine are simply different forms of the same substance and all crack cocaine originates as powder cocaine.

(2) The physiological and psychotropic effects of cocaine are similar regardless of whether it is in the form of cocaine base (crack) or cocaine hydrochloride (powder).

(3) One of the principal objectives of the Anti-Drug Abuse Act of 1986, which established different mandatory minimum penalties for different drugs, was to target Federal law enforcement and prosecutorial resources on serious and major drug traffickers.

(4) In 1986, Congress linked mandatory minimum penalties to different drug quantities, which were intended to serve as proxies for identifying offenders who were "serious" traffickers (managers of retail drug trafficking) and "major" traffickers (manufacturers or the kingpins who headed drug organizations).

(5) Although drug purity and individual tolerance vary, making it difficult to state with specificity the individual dose of each form of cocaine, 5 grams of powder cocaine generally equals 25 to 50 individual doses and 500 grams of powder cocaine generally equals 2,500 to 5,000 individual doses, while 5 grams of crack cocaine generally equals 10 to 50 individual doses (or enough for a heavy user to consume in one weekend) and 500 grams of crack cocaine generally equals 100 to 500 individual doses.

(6) In part because Congress believed that crack cocaine had unique properties that made it instantly addictive, the Anti-Drug Abuse Act of 1986 established an enormous disparity (a 100 to 1 powder-to-crack ratio) in the quantities of powder and crack cocaine that trigger 5- and 10-year mandatory minimum sentences. This disparity permeates the Sentencing Guidelines.

(7) Congress also based its decision to establish the 100 to 1 quantity ratio on the beliefs that—

(A) crack cocaine distribution and use was associated with violent crime to a much greater extent than was powder cocaine;

(B) prenatal exposure to crack cocaine was particularly devastating for children of crack users;

(C) crack use was particularly prevalent among young people; and

(D) crack cocaine's potency, low cost and ease of distribution and use were fueling its widespread use.

(8) As a result, it takes 100 times more powder cocaine than crack cocaine to trigger the 5- and 10-year mandatory minimum sentences. While it takes 500 grams of powder cocaine to trigger the 5-year mandatory minimum sentence, it takes just 5 grams of crack cocaine to trigger that sentence. Similarly, while it takes 5 kilograms of powder cocaine to trigger the 10-year mandatory minimum sentence, 50 grams of crack cocaine will trigger the same sentence.

(9) Most of the assumptions on which the current penalty structure was based have turned out to be unfounded.

(10) Studies comparing usage of powder and crack cocaine have shown that there is little difference between the 2 forms of the drug and fundamentally undermine the current quantity-based

sentencing disparity. More specifically, the studies have shown the following:

(A) Both forms of cocaine cause identical effects, although crack is smoked, while powder cocaine is typically snorted. Epidemiological data show that smoking a drug delivers it to the brain more rapidly, which increases likelihood of addiction. Therefore, differences in the typical method of administration of the two forms of the drug, and not differences in the inherent properties of the two forms of the drug, make crack cocaine potentially more addictive to typical users than powder cocaine. Both forms of the drug are addictive, however, and the treatment protocol for the drug is the same regardless of the form of the drug the patient has used;

(B) Violence committed by crack users is relatively rare, and overall violence has decreased for both powder and crack cocaine offenses. Almost all crack-related violence is systemic violence that occurs within the drug distribution process. Sentencing enhancements are better suited to punish associated violence,

which are separate, pre-existing crimes in and of themselves;

(C) The negative effects of prenatal exposure to crack cocaine were vastly overstated. They are identical to the effects of prenatal exposure to powder cocaine and do not serve as a justification for the sentencing disparity between crack and powder;

(D) Although Congress in the mid-1980s was understandably concerned that the low-cost and potency of crack cocaine would fuel an epidemic of use by minors, the epidemic of crack cocaine use by young people never materialized to the extent feared. In fact, in 2005, the rate of powder cocaine use among young adults was almost 7 times as high as the rate of crack cocaine use. Furthermore, sentencing data suggest that young people do not play a major role in crack cocaine trafficking at the Federal level;

(E) The current 100:1 penalty structure undermines various congressional objectives set forth in the Anti-Drug Abuse Act of 1986. Data collected by the United States Sentencing Commission show that federal resources have been targeted at offenders who are subject to

the mandatory minimum sentences, which sweep in low-level crack cocaine users and dealers.

(11) In 1988, Congress set a mandatory minimum sentence for mere possession of crack cocaine, the only controlled substance for which there is a mandatory minimum sentence for simple possession for a first-time offender.

(12) Major drug traffickers and kingpins traffic in powder, not crack.

(13) Contrary to Congress's objective of focusing Federal resources on drug kingpins, the majority of Federal powder and crack cocaine offenders are those who perform low level functions in the supply chain.

(14) As a result of the low-level drug quantities that trigger lengthy mandatory minimum penalties for crack cocaine, the concentration of lower level Federal offenders is particularly pronounced among crack cocaine offenders, more than half of whom were street level dealers in 2005.

(15) The Departments of Justice, Treasury, and Homeland Security are the agencies with the greatest capacity to investigate, prosecute and dismantle the highest level of drug trafficking organiza-

tions, but investigations and prosecutions of low-level offenders divert Federal personnel and resources from the prosecution of the highest-level traffickers, for which such agencies are best suited.

(16) The unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts Federal resources from high-level drug traffickers. It also disproportionately affects the African-American community. According to the United States Sentencing Commission's May 2007 Report, 82 percent of Federal crack cocaine offenders sentenced in 2006 were African-American, while 8 percent were Hispanic and 8 percent were white.

(17) Only 13 States have sentencing laws that distinguish between powder and crack cocaine.

SEC. 3. COCAINE SENTENCING DISPARITY ELIMINATION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "5 kilograms"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "500 grams."

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking "50 grams" and inserting "5 kilograms"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "500 grams".

SEC. 4. ELIMINATION OF MANDATORY MINIMUM FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 5. INCREASED EMPHASIS ON CERTAIN AGGRAVATING AND MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines to ensure that the penalties for an offense involving trafficking of a controlled substance—

(1) provide tiered enhancements for the involvement of a dangerous weapon or violence, including, if appropriate—

(A) an enhancement for the use or brandishment of a dangerous weapon;

(B) an enhancement for the use, or threatened use, of violence; and

(C) any other enhancement the Commission considers necessary;

(2) adequately take into account the culpability of the defendant and the role of the defendant in the offense, including consideration of whether enhancements should be added, either to the existing enhancements for aggravating role or otherwise, that take into account aggravating factors associated with the offense, including—

(A) whether the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood;

(B) whether the defendant is an organizer or leader of drug trafficking activities involving 5 or more persons;

(C) whether the defendant maintained an establishment for the manufacture or distribution of the controlled substance;

(D) whether the defendant distributed a controlled substance to an individual under the age of 21 years of age or to a pregnant woman;

(E) whether the defendant involved an individual under the age of 18 years or a pregnant woman in the offense;

(F) whether the defendant manufactured or distributed the controlled substance in a location described in section 409(a) or section 419(a) of the Controlled Substances Act (21 U.S.C. 849(a) or 860(a));

(G) whether the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement officer in connection with the offense;

(H) whether the defendant was involved in importation into the United States of a controlled substance;

(I) whether bodily injury or death occurred in connection with the offense;

(J) whether the defendant committed the offense after previously being convicted of a felony controlled substances offense; and

(K) any other factor the Commission considers necessary; and

(3) adequately take into account mitigating factors associated with the offense, including—

(A) whether the defendant had minimum knowledge of the illegal enterprise;

(B) whether the defendant received little or no compensation in connection with the offense;

(C) whether the defendant acted on impulse, fear, friendship, or affection when the defendant was otherwise unlikely to commit such an offense; and

(D) whether any maximum base offense level should be established for a defendant who qualifies for a mitigating role adjustment.

SEC. 6. OFFENDER DRUG TREATMENT INCENTIVE GRANTS.

(a) GRANT PROGRAM AUTHORIZED.—The Attorney General shall carry out a grant program under which the Attorney General may make grants to States, units of local government, territories, and Indian tribes in an amount described in subsection (c) to improve the provision of drug treatment to offenders in prisons, jails, and juvenile facilities.

(b) REQUIREMENTS FOR APPLICATION.—

(1) IN GENERAL.—To be eligible to receive a grant under subsection (a) for a fiscal year, an entity described in that subsection shall, in addition to any other requirements specified by the Attorney General, submit to the Attorney General an applica-

tion that demonstrates that, with respect to offenders in prisons, jails, and juvenile facilities who require drug treatment and who are in the custody of the jurisdiction involved, during the previous fiscal year that entity provided drug treatment meeting the standards established by the Single State Authority for Substance Abuse (as that term is defined in section 201) for the relevant State to a number of such offenders that is 2 times the number of such offenders to whom that entity provided drug treatment during the fiscal year that is 2 years before the fiscal year for which that entity seeks a grant.

(2) OTHER REQUIREMENTS.—An application under this section shall be submitted in such form and manner and at such time as specified by the Attorney General.

(c) ALLOCATION OF GRANT AMOUNTS BASED ON DRUG TREATMENT PERCENT DEMONSTRATED.—The Attorney General shall allocate amounts under this section for a fiscal year based on the percent of offenders described in subsection (b)(1) to whom an entity provided drug treatment in the previous fiscal year, as demonstrated by that entity in its application under that subsection.

(d) USES OF GRANTS.—A grant awarded to an entity under subsection (a) shall be used—

(1) for continuing and improving drug treatment programs provided at prisons, jails, and juvenile facilities of that entity; and

(2) to strengthen rehabilitation efforts for offenders by providing addiction recovery support services, such as job training and placement, education, peer support, mentoring, and other similar services.

(e) REPORTS.—An entity that receives a grant under subsection (a) during a fiscal year shall, not later than the last day of the following fiscal year, submit to the Attorney General a report that describes and assesses the uses of such grant.

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $10,000,000 to carry out this section for each of fiscal years 2008 and 2009.

SEC. 7. GRANTS FOR DEMONSTRATION PROGRAMS TO REDUCE DRUG USE SUBSTANCE ABUSERS.

(a) AWARDS REQUIRED.—The Attorney General may make competitive grants to eligible partnerships, in accordance with this section, for the purpose of establishing demonstration programs to reduce the use of alcohol and other drugs by supervised substance abusers during the period in which each such substance abuser is in prison,

jail, or a juvenile facility, and until the completion of parole or court supervision of such abuser.

(b) USE OF GRANT FUNDS.—A grant made under subsection (a) to an eligible partnership for a demonstration program, shall be used—

(1) to support the efforts of the agencies, organizations, and researchers included in the eligible partnership, with respect to the program for which a grant is awarded under this section;

(2) to develop and implement a program for supervised substance abusers during the period described in subsection (a), which shall include—

(A) alcohol and drug abuse assessments that—

(i) are provided by a State-approved program;

(ii) provide adequate incentives for completion of a comprehensive alcohol or drug abuse treatment program, including through the use of graduated sanctions; and

(B) coordinated and continuous delivery of drug treatment and case management services during such period; and

(3) to provide addiction recovery support services (such as job training and placement, peer support, mentoring, education, and other related services) to strengthen rehabilitation efforts for substance abusers.

(c) APPLICATION.—To be eligible for a grant under subsection (a) for a demonstration program, an eligible partnership shall submit to the Attorney General an application that—

(1) identifies the role, and certifies the involvement, of each agency, organization, or researcher involved in such partnership, with respect to the program;

(2) includes a plan for using judicial or other criminal or juvenile justice authority to supervise the substance abusers who would participate in a demonstration program under this section, including for—

(A) administering drug tests for such abusers on a regular basis; and

(B) swiftly and certainly imposing an established set of graduated sanctions for noncompliance with conditions for reentry into the community relating to drug abstinence (whether

imposed as a pre-trial, probation, or parole condition, or otherwise);

(3) includes a plan to provide supervised substance abusers with coordinated and continuous services that are based on evidence-based strategies and that assist such abusers by providing such abusers with—

(A) drug treatment while in prison, jail, or a juvenile facility;

(B) continued treatment during the period in which each such substance abuser is in prison, jail, or a juvenile facility, and until the completion of parole or court supervision of such abuser;

(C) addiction recovery support services;

(D) employment training and placement;

(E) family-based therapies;

(F) structured post-release housing and transitional housing, including housing for recovering substance abusers; and

(G) other services coordinated by appropriate case management services;

(4) includes a plan for coordinating the data infrastructures among the entities included in the eligible partnership and between such entities and the

providers of services under the demonstration program involved (including providers of technical assistance) to assist in monitoring and measuring the effectiveness of demonstration programs under this section; and

(5) includes a plan to monitor and measure the number of substance abusers—

(A) located in each community involved; and

(B) who improve the status of their employment, housing, health, and family life.

(d) REPORTS TO CONGRESS.—

(1) INTERIM REPORT.—Not later than September 30, 2008, the Attorney General shall submit to Congress a report that identifies the best practices relating to the comprehensive and coordinated treatment of substance abusers, including the best practices identified through the activities funded under this section.

(2) FINAL REPORT.—Not later than September 30, 2009, the Attorney General shall submit to Congress a report on the demonstration programs funded under this section, including on the matters specified in paragraph (1).

(e) DEFINITIONS.—In this section:

(1) ELIGIBLE PARTNERSHIP.—The term ''eligible partnership'' means a partnership that includes—

(A) the applicable Single State Authority for Substance Abuse;

(B) the State, local, territorial, or tribal criminal or juvenile justice authority involved;

(C) a researcher who has experience in evidence-based studies that measure the effectiveness of treating long-term substance abusers during the period in which such abusers are under the supervision of the criminal or juvenile justice system involved;

(D) community-based organizations that provide drug treatment, related recovery services, job training and placement, educational services, housing assistance, mentoring, or medical services; and

(E) Federal agencies (such as the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the office of a United States attorney).

(2) SUBSTANCE ABUSER.—The term ''substance abuser'' means an individual who—

(A) is in a prison, jail, or juvenile facility;

(B) has abused illegal drugs or alcohol for a number of years; and

(C) is scheduled to be released from prison, jail, or a juvenile facility during the 24-month period beginning on the date the relevant application is submitted under subsection (c).

(3) SINGLE STATE AUTHORITY FOR SUBSTANCE ABUSE.—The term ''Single State Authority for Substance Abuse'' means an entity designated by the Governor or chief executive officer of a State as the single State administrative authority responsible for the planning, development, implementation, monitoring, regulation, and evaluation of substance abuse services in that State.

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $5,000,000 for each of fiscal years 2008 and 2009.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

(a) IN GENERAL.—The United States Sentencing Commission, in its discretion, may—

(1) promulgate amendments pursuant to the directives in this Act in accordance with the procedure set forth in section 21(a) of the Sentencing Act of

1987 (Public Law 100–182), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided in paragraph (1), make such conforming amendments to the Sentencing Guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

(b) PROMULGATION.—The Commission shall promulgate any amendments under subsection (a) promptly so that the amendments take effect on the same date as the amendments made by this Act.

SEC. 9. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in subparagraph (A), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in subparagraph (B), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively, and

(2) in paragraph (2), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS AND REQUIRED REPORT.

(a) AUTHORIZATION OF APPROPRIATIONS FOR DEPARTMENT OF JUSTICE.—There is authorized to be appropriated to the Department of Justice not more than $36,000,000 for each of the fiscal years 2008 and 2009 for the prosecution of high-level drug offenses, of which—

(1) $15,000,000 is for salaries and expenses of the Drug Enforcement Administration;

(2) $15,000,000 is for salaries and expenses for the Offices of United States Attorneys;

(3) $4,000,000 each year is for salaries and expenses for the Criminal Division; and

(4) $2,000,000 is for salaries and expenses for the Office of the Attorney General for the management of such prosecutions.

(b) AUTHORIZATION OF APPROPRIATIONS FOR DEPARTMENT OF TREASURY.—There is authorized to be appropriated to the Department of the Treasury for salaries and expenses of the Financial Crime Enforcement Network (FINCEN) not more than $10,000,000 for each of fiscal years 2008 and 2009 in support of the prosecution of high-level drug offenses.

(c) AUTHORIZATION OF APPROPRIATIONS FOR DEPARTMENT OF HOMELAND SECURITY.—There is authorized to be appropriated for the Department of Homeland Security not more than $10,000,000 for each of fiscal years 2008 and 2009 for salaries and expenses in support of the prosecution of high-level drug offenses.

(d) ADDITIONAL FUNDS.—Amounts authorized to be appropriated under this section shall be in addition to

amounts otherwise available for, or in support of, the prosecution of high-level drug offenses.

(e) REPORT OF COMPTROLLER GENERAL.—Not later than 180 days after the end of each of fiscal years 2008 and 2009, the Comptroller General shall submit to the Committees on the Judiciary and the Committees on Appropriations of the Senate and House of Representatives a report containing information on the actual uses made of the funds appropriated pursuant to the authorization of this section.

SEC. 11. EFFECTIVE DATE.

The amendments made by this Act shall apply to any offense committed on or after 180 days after the date of enactment of this Act. There shall be no retroactive application of any portion of this Act.

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LETTER DATED JANUARY 31, 2008, FROM THE HONORABLE JOHN CONYERS, JR. TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary

January 31, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

One week from today, you will testify for the first time before the House Judiciary Committee. I very much look forward to a frank and productive discussion that will shed light on your approach to the challenging issues facing the Department of Justice (DOJ) and our nation at this time. In order to make the most of our limited time, I am sending the following questions about issues of interest to myself and other Committee members. We would appreciate receiving your responses, along with your prepared testimony, no later than the close of business on February 5, 2008, so that all Committee members may have an opportunity to review them before you testify next week. In addition, please provide responses to the previous Committee letters to which there has not yet been a response, including letters to the Department of May 8, November 9 and December 20, 2007 and January 10, January 15, January 23, and January 29, 2008.

1. **Politicization of the Department of Justice** - Former Reagan Attorney General Richard Thornburgh is just one of a number of former DOJ officials who have expressed concern about the politicization of the Department in recent years, including U.S. Attorneys' offices, as reflected in the forced resignation of U.S. Attorneys in 2006 and other events.

    a. In addition to your revisions to DOJ policy concerning contacts between DOJ personnel and White House officials regarding pending matters, which I commend, describe any other steps you have taken to address this concern, whether with respect to the hiring of career personnel, restoring the traditionally apolitical approach to prosecution of the U.S. Attorney corps, communicating to the entire Department and the public that partisan politics must be checked at the door, or otherwise.

b. The website TPMMuckraker, which played an important role in providing information to the public concerning the U.S. Attorney scandal, revealed that it has recently been removed from DOJ's press release email distribution list. Who made this decision and why, and was there a change in policy in press release distribution after you became Attorney General?

2. **Waterboarding and Torture** – Your January 29, 2008, letter to the Chairman and members of the Senate Judiciary Committee, which preceded your Senate testimony on the same topic the following day, states that "There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question."

a. What specific "current law" were you referring to that would prohibit waterboarding "in some circumstances"? What "circumstances" were you referring to?

b. Are there any circumstances in which you believe that the waterboarding of a captured American soldier would be lawful?

c. Yesterday, Senator Durbin asked if you had reviewed a 2005 legal opinion that the New York Times described as providing "explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures."[1] This memorandum, authored along with others in this period by Steven Bradbury, was apparently approved by former Attorney General Gonzales over the objections of his Deputy Jim Comey, who stated that the Department would be "ashamed" if it became public. You indicated that you had not reviewed these memoranda but that you would do so. I urge you to complete that review and state whether you agree with the legal reasoning that they contain and would have approved the opinion.

3. **Selective Prosecution** – During your confirmation hearing before the Senate Judiciary Committee, you pledged in response to a question from Senator Schumer to look into the Siegelman prosecution in Alabama, which was the subject in part of a Joint Hearing of two House Judiciary Subcommittees. You also stated that you would review a recent study finding that, during the Bush

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[1] Shane, Johnston, and Risen, *Secret U.S. Endorsement of Severe Interrogations*, New York Times, Oct. 4, 2007.

Administration, Democratic officeholders have been investigated by Department prosecutors six times more often than Republicans.

a. Please describe what steps you have taken to familiarize yourself with the Siegelman matter, including the allegations of politicization that Senator Schumer referenced in his question to you? Did you review the record of our Subcommittees' Joint Hearing on October 23, 2007?

b. Have you taken any actions or formed any views about that matter and the allegations of political pressure referred to by Senator Schumer and discussed at our hearing?

c. Please describe what steps you have taken to familiarize yourself with the study regarding the relative frequency of investigations of Democrats and Republicans. Have you taken any actions or formed any views about that issue in response to your review of the study?

4. **Investigation Into Destruction of CIA Tapes –** Justice Department regulations require you to appoint an outside special counsel when: 1) a "criminal investigation of a person or matter is warranted," 2) the investigation "by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department," and 3) "it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." Although you have publicly stated that you do not intend to appoint a special prosecutor to investigate whether the CIA violated the law when it destroyed videotapes of terrorist suspect interrogations, please address the following questions.

a. In light of the fact that the Department may have been consulted on matters and decisions which are central to the investigation, why do you believe that this matter poses no risk of a conflict of interest for the Department and that the appointment of a special counsel from outside the government would not be in the public interest?

b. What is the scope of AUSA Durham's investigative authority and reporting requirements and have any limitations on the investigation's scope, jurisdiction, subject matter and methods been placed on him? In particular, although you testified yesterday that he may investigate the issue of what was shown on the tapes as part of the motive for their destruction, does the scope of the investigation include the legality of the conduct shown on the tapes

and of the alleged failure to provide the tapes to the 9/11 Commission or to any federal court?

c. What attorney and other resources will be dedicated to the investigation?

d. What role and authority will the Deputy Attorney General have in this investigation?

5. **Vote Suppression and Civil Rights Enforcement –** In remarks you made at a Martin Luther King, Jr. Day Prayer Breakfast on January 9th, you said that vigorous, fair, and impartial enforcement of the civil rights laws is among your "top priorities" as Attorney General. You also stated that the Civil Rights Division will play a crucial role through monitors and other means in assuring that the laws are scrupulously observed as our nation chooses a new President.

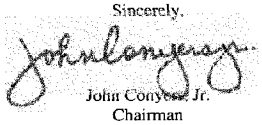
a. Despite complaints of voter suppression and intimidation, this Administration has brought fewer cases under Section 2 of the Voting Rights Act, and brought them at a significantly lower rate, than any other administration since 1982. What are your plans for ensuring that Section 2 is vigorously enforced and enforced in a fair and impartial manner?

b.. What actions is the Department preparing to take to address complaints of caging, intimidation, and other campaign tactics intended to suppress the minority vote?

c. As we approach the 2008 Presidential election and the 2010 Census, there will likely be an upsurge in submissions under Section 5 of the Voting Rights Act. What steps are being taken to prepare for and respond to an increase in Section 5 submissions?

Please send your responses to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, D.C. 20515 (tel.: 202-225-3951; fax: 202-225-7680). Thank you for your prompt attention to this matter, and we look forward to hearing from you next week.

Sincerely,



John Conyers, Jr.
Chairman

cc: Honorable Lamar S. Smith

POST-HEARING QUESTIONS POSED BY THE HONORABLE JOHN CONYERS, JR., THE HONORABLE ROBERT C. "BOBBY" SCOTT, THE HONORABLE LINDA T. SÁNCHEZ, THE HONORABLE KEITH ELLISON, AND THE HONORABLE ROBERT GOODLATTE TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

February 29, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Mr. Attorney General:

Enclosed you will find additional questions from members of the Committee on the Judiciary to supplement the information already provided at the February 7, 2008, hearing. Please deliver your written responses to the attention of Renata Strause of the House Committee on the Judiciary, 2138 Rayburn House Office Building, Washington, DC, 20515 no later than March 14, 2008. If you have any further questions or concerns, please contact Renata Strause at (202) 225-3951.

As these questions are submitted to you as part of an oversight hearing focused in part on your personal knowledge of certain matters, the Committee would ask that you review each answer carefully to make sure you have given your direct and complete answer to the question asked. Once you have done so, you may also provide whatever further explanation or context you believe may be helpful in understanding your answer.

As you will notice from the first question in the attachments, we are still awaiting responses to questions in our January 31, 2008, letter to you, and, given that those questions have been outstanding for an extended period of time, we request that you respond to those specific questions by March 7, 2008. We appreciate your cooperation in this matter, and we await responses to our questions.

Sincerely,

John Conyers, Jr.
Chairman

Enclosure

cc: Hon. Brian Benczkowski
Hon. Lamar S. Smith

QUESTIONS FOR THE RECORD

ATTORNEY GENERAL MICHAEL MUKASEY
APPEARANCE BEFORE THE HOUSE JUDICIARY COMMITTEE

February 7, 2008

Questions Submitted by the Honorable John Conyers, Jr.
Chairman of the House Judiciary Committee

Outstanding Questions

1. The Committee sent you several questions in a January 31, 2008, letter in advance of the hearing, and after having not received responses to them prior to the hearing, we reiterated that request via an e-mail to the head of the Office of Legislative Affairs, Brian Benczkowski, immediately following the hearing. As of today, we still have not received any responses to those questions. Please respond to the questions in that letter by C.O.B. March 7, 2008.

FY 2009 Budget

2. Do you support the President's proposal to cut the budget of the Office of Violence Against Women by $120 million which may require closure of many shelters and rape crisis centers? If so, why?

Waterboarding and Torture

3. The Committee has twice written to the Department, including to you personally, asking for memoranda on the legality of CIA interrogation methods, reportedly including waterboarding, that the Office of Legal Counsel prepared. As you know, one reason Mr. Bradbury has not been confirmed is because those memoranda have not been turned over to the appropriate congressional committees. Since you have assured Congress that waterboarding is no longer a technique available to the CIA or Department of Defense, will you now supply those memoranda to our committee? If not, why not?

4. In response to my questions during the hearing, you expressed a willingness to have a dialogue regarding the Committee's desire to acquire the legal memoranda authorizing the CIA's enhanced interrogation techniques. Do you remain committed to that dialogue in an effort for the Committee to obtain those memoranda? If not, why not?

5. During the hearing you testified that you would not authorize a criminal investigation into the C.I.A.'s use of waterboarding because they relied on Department of Justice advice. It is the Committee's understanding that a memo authorizing waterboarding was not written until 2005, well after the waterboarding occurred.

a) There was another memo authorizing aggressive interrogations that was authored in 2002. Is it true that the Department revoked that memo?

b) Is it your opinion that a person who relies on *any* Department opinion, especially one that has been revoked, is immune from criminal investigation or prosecution? If so, please explain.

c) As you well know, Department regulations require the appointment of an outside special counsel if an investigation would cause the Department to have a conflict of interest. If you believe, as your testimony indicated, that a person cannot be criminally prosecuted if he/she relied on Department opinions, doesn't that mean that the Department has a conflict of interest and that an outside special counsel should be appointed. If not, please explain.

d) In light of the possible conflict posed by the Department's investigation, wouldn't it be more prudent for an outside special counsel to assess this issue and determine, for example, if the Department's advice was lawful or the person's reliance on it was reasonable. If not, why not?

e) In light of the fact that the Office of Professional Responsibility is investigating the circumstances surrounding the Department's opinions that established a legal basis for the CIA's interrogation program, why do you still maintain that Mr. Durham's investigation should not also encompass the enhanced interrogation techniques depicted on the destroyed videotapes?

Political Independence

6. Did you select or have input into the selection of your leadership team, including your Chief of Staff, Deputy Attorney General, Associate Attorney General, and the heads of key components such as the Criminal Division, the Civil Rights Division, the Office of Legal Counsel, and the Office of Public Affairs?

   a) What type of input did you have?

   b) Did you have veto power over the individuals selected for these positions?

   c) Were any individuals suggested by you for any of these positions ultimately not selected?

New Hampshire Phone Jamming Matter

7. On October 3, four members of the Committee sent your predecessor a letter about two major vote suppression matters in New Hampshire and Nevada and elsewhere. That letter posed seven specific questions about the Department's handling of these cases.

   On December 20, Chairman Conyers followed up after a disturbing news article reported that senior Department officials had "slowed the inquiry" in order "to protect top GOP officials." That letter asked the Department to provide information that would allow cooperative interviews on this subject to be conducted.

   The Department responded on January 22, 2008 and on February 11, 2008. The Department's response ignored many of the specific questions posed in the members' October 3rd letter. Therefore, please answer the following remaining questions:

   a) Please identify any limitations or constraints placed by Administration or Department officials on the Phone Jamming and Sproul investigations, including limits on the scope of the investigations, on investigative techniques that could be employed, on permissible subjects or targets of the investigations, on geographic locus of the investigation, or any other limitations on the investigations' reach. In particular, specifically address the claims that all case decisions regarding the Phone Jamming matter had to be personally approved by the Attorney General.
   b) Please identify all Department offices, divisions, and entities involved in the Phone Jamming and Sproul investigations at any time.
   c) Please describe all steps taken to determine whether or not any White House personnel, Bush/Cheney campaign personnel, or other officials or leaders of any Republican Party organization had any knowledge of, involvement in, or potential liability regarding the Phone Jamming or Sproul matters.
   d) Please explain why the Nevada and related matters were considered not worthy of charges where numerous witnesses described to the press engaging in serious misconduct such as refusing to accept registrations from Democratic voters and destroying Democratic voter registration cards.

Protecting Overseas Contractors/Jamie Leigh Jones Rape Case

8. On December 19, 2007, the Crime Subcommittee held a hearing about the awful case of Jamie Leigh Jones – who reports that she was raped by coworkers in the Iraq green zone and who has struggled for years to bring attention, and prosecution resources, to her case and many other cases like it. The Subcommittee was very disappointed that the

Department did not send a witness to this hearing despite our invitation or respond fully to the December 11, 2007, letter from Chairman Conyers and Representative Poe on the issue.

a) How would you respond to the suggestion that this indicates that the Department places a low priority on the issue?

b) Would you be willing to provide a witness for a future hearing? If not, why not?

c) Please answer the question from that letter as to:

i) how many MEJA cases have been referred to the Department;
ii) how many remain open; and
iii) how many involved sexual assault.

9. On January 23, 2008, Chairman Conyers, Chairman Scott, and Representative Ted Poe wrote to you and the Department of Defense seeking further information on the Departments' indications that they would put in better procedures for this sort of case and asking for a briefing and some data on these types of cases. You have not responded to this letter. When will you respond to the letter?

10. What steps have you taken to ensure that overseas contractor cases, including alleged sexual assaults, do not fall through the cracks? Please explain.

Limited authority of special prosecutor Durham and national security issues in the CIA tape destruction investigation

11. Chairman Conyers sent a letter on January 31, 2008, following a letter from 18 Committee members on January 15, 2008, asking you to explain the scope of AUSA Durham's investigative authority and articulate any limits that might be placed on the investigation's scope, jurisdiction, subject matter and methods.

During your January 30, 2008, Senate testimony, Senator Leahy raised concerns about the lack of independence of AUSA Durham who, since he is a current AUSA and appointed under 28 U.S.C 510, could have been given the plenary authority that the Acting Attorney General granted to Patrick Fitzgerald to investigate the Valerie Plame case but wasn't.

a) Is it your position that any information or evidence can be withheld from AUSA Durham?

b) If yes, then:

i) On what grounds?
ii) Who would make that decision?
iii) What, if any, recourse does AUSA Durham have?
iv) Can he appeal to a court?

c) If no, then:

i) At the conclusion of the investigation, if AUSA Durham concludes that prosecution is appropriate, do you retain the power to override that decision? If so, on what grounds?
ii) If the prosecution can ultimately be squashed over AUSA Durham's objection, then why not specify that Mr. Durham has the same plenary authority as granted Mr. Fitzgerald? Please explain.

State Secrets Privilege

12. In recent cases challenging the constitutionality of rendition to torture or warrantless wiretapping, the Justice Department has argued that the government's decision that the state secrets privilege applies must be given "utmost deference" by judges. Under this standard, how and in what circumstances can a court ever disagree with the Government? Please explain.

Cooperation with Investigations

13. Have you directed all DOJ personnel – including politically appointed personnel in the Office of Legal Counsel and elsewhere – to fully cooperate with the Office of Inspector General (OIG) and Office of Professional Responsibility (OPR) in all pending investigations?

14. To your knowledge, have DOJ personnel asserted Executive Privilege or other privileges in response to inquiries by OIG/OPR?

15. Have you directed DOJ personnel not to assert Executive Privilege in response to inquiries? If not, why not?

16. To your knowledge, has the White House or Office of Vice President attempted in any way to limit the OIG's or OPR's access to information in the possession of DOJ attorneys – in OLC or other components – either by instructing them not to cooperate, or instructing them to assert Executive Privilege? If so, please explain.

17. Will you discipline or fire persons who do not fully cooperate with the OIG or OPR? If

not, why not?

18. As you know, OIG and OPR are undertaking an investigation into the dismissal of United States Attorneys and other allegations of politicization in your Department. Are any former or current employees of the Justice Department refusing to cooperate in that investigation? If so, who?

The Department's Representations Concerning the Jose Padilla Case

19. For 3 ½ years, DOJ argued that national security required the military detention of Mr. Padilla, an American citizen arrested in the U.S., as an unlawful enemy combatant. Representations were made to you as a federal judge and to other courts. But within a few weeks of the Fourth Circuit's opinion in September, 2005, approving the military detention of Padilla based on DOJ's representations, the Administration made the decision to move Padilla to civilian courts to face federal charges, thus mooting out Supreme Court review. The Fourth Circuit commented that DOJ's actions created "at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court." Padilla v. U.S., 432 F.3d 582, 583 (4th Cir. 2005).

    The Committee is aware that Padilla has since been found guilty in the civilian courts – and express no opinion on that case – but remain concerned that an American was placed in custody for years based upon representations that even the Fourth Circuit – hardly a liberal court – has concluded may not have been credible. The court specifically commented that the result may "ultimately prove to be substantial cost to the government's credibility before the courts." 432 F. 3d at 587.

    a) The Committee recognizes that you were not the Attorney General when this occurred, but that it was a matter with which you had significant familiarity as a federal judge. As Attorney General, though, have you examined, or asked the Office of Professional Responsibility (OPR) or the Inspector General, to examine the source and truthfulness of the representations that Department of Justice attorneys made to the various courts – including you – in support of the Administration's efforts to have Mr. Padilla held? If no, will you do this?

    b) Isn't it standard procedure that OPR investigate allegations that a DOJ attorney made false assertions before a federal court that were not credible?

    c) Particularly in light of the concern that this episode may substantially harm DOJ's credibility before the courts, have you examined the question of who made the decision to transfer Mr. Padilla to the federal courts? If not, why not?

    d) To what extent was avoiding Supreme Court review a factor in that decision?

Jena 6 and Related Matters

20. As you know, this Committee held a hearing last year to investigate the Jena 6 incident, in which four black juveniles in Louisiana were charged with attempted murder and jailed following a school yard fight, and to examine the failure by U.S. Attorney Donald Washington to pursue hate crimes charges against the two white students who retaliated by hanging nooses from a school yard tree. Since the Jena 6 incident, there have been numerous high profile incidents of noose hangings, including one found in a black Coast Guard's bag, one on a Maryland college campus, and on the office door of a black professor at Columbia University in New York, just to name a few.

    a) But what is the status of hate crimes charges within the Department concerning these deplorable noose-hanging incidents at this time, including the specific incidents I have just listed?

    b) Do you believe that the federal hate crimes statute applies to juveniles? If not, why not?

    c) As to the Community Relations Division, what recent advances, if any, have been made?

The Office of the Pardon Attorney

21. A February 4, 2008, New York Times article detailed the mismanagement within the Office of the Pardon Attorney, citing a backlog of pardon requests. The article also recounted the abrupt resignation of the pardon attorney, Roger Adams, whose "departure came on the heels of a seven-month investigation of alleged mismanagement by the Justice Department's inspector general."[1]

    a) What steps are you taking, or do you plan to take, to rectify the problems in the Office of the Pardon Attorney?

    b) When do you intend to appoint a permanent successor to Roger Adams?

Chief Judge Mark Wolf's Letter

22. As you know, the chief federal judge in Boston, Mark Wolf, recently sent you a letter urging you to discipline Department prosecutors who commit misconduct, and to force them to be truthful in court. His letter was motivated by a concern pertaining to the

[1] George Lardner, Jr., "*Begging Bush's Pardon*," N.Y. Times, February 4, 2008.

"Department's mild and secret discipline of Assistant U.S. Attorney Jeffrey Auerhahn in 2006 for misconduct that Wolf said required him to order the 'release from prison of a capo and associate of the Patriarca family of La Cosa Nostra."[2] What have you done in response to Chief Judge Wolf's letter to prevent misconduct from occurring in the future and to discipline prosecutors who had committed misconduct in the past? Please explain.

2004 OLC Opinion concerning the United States Commission on Civil Rights

23. On December 6, 2004, the Office of Legal Counsel (OLC) issued an opinion pertaining to the U.S. Commission on Civil Rights that allows the president to appoint as many commissioners to the Commission of the same political party as he chooses, as long as a sufficient number of sitting commissioners switch political party affiliations prior to individual presidential appointments, seemingly undermining the statutory bipartisan requirement codified in 42 U.S.C. § 1975(b). Given your willingness to review OLC opinions, would you consider reviewing and withdrawing this particular opinion? If not, why not?

Executive Office for Immigration Review (EOIR)

Personnel Issues:

24. In FY2008, the Department of Justice (DOJ) requested funding for twenty additional Immigration Judges and ten staff attorneys and support staff to handle the increase in EOIR's workload. But in its budget request for FY2009, DOJ is not requesting additional full-time employees for EOIR, despite the continuing increase in immigration enforcement personnel and activities that will likely result in a greater workload for EOIR. For example, the number of the Department of Homeland Security (DHS)'s Fugitive Operations Teams (FOTs) for United States immigration and Customs Enforcement (ICE) has increased from 15 teams in 2005, to 50 teams in 2006, to 75 teams in 2007. That number will grow to 104 teams in FY2008. Likewise, ICE has also greatly increased certain types of enforcement in the same time period. For example, administrative arrests in worksite enforcement actions have grown from 485 in FY 2002 to 4,077 in FY 2007.Can you please explain why DOJ did not request additional full-time employees for EOIR given the expected increase in EOIR's workload due to increased immigration enforcement actions by DHS?

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[2] Jonathan Saltzman, "*U.S. Judge Chastises Dept. of Justice: Blasts handling of prosecutor's misconduct*," The Boston Globe, January 5, 2008.

25. If you do not believe that EOIR needs additional full-time employees in FY2009, can you please tell us your plan for ensuring that EOIR will not develop a backlog without additional personnel? We believe that such a plan must also ensure that EOIR can provide respondents in removal proceedings with fair, thorough, and timely adjudication, and that potentially dangerous aliens are removed in a timely manner.

Improving BIA Performance:

26. In August 2006, then-Attorney General Alberto Gonzales announced that DOJ will implement 22 measures to improve the performance of the immigration courts and the Board of Immigration Appeals (BIA). Please give us an update on the progress of each initiative.

Court Reporting vs. Digital Audio Recording:

27. DOJ's budget request for EOIR is $261.4 million, $27 million over the enacted FY2008 spending level. This amount includes $10 million from the Southwest Border Enforcement Initiative. Of the $10 million, $8.3 million will be used to install and maintain a Digital Audio Recording (DAR) system for immigration courts nationwide. Immigration Judges currently use audio cassette recorders to tape proceedings in immigration courts. These recorders are often old and/or set at improper settings. In addition to their many responsibilities during the hearings, the Immigration Judges must also ensure that the tape recorder is recording the proceedings correctly. These problems are compounded by the fact that the quality of the recordings sometimes fails to capture overlapping speakers, or speakers with foreign accents. These factors lead to unintelligible written transcripts that cannot be adequately reviewed by the BIA or the federal courts. While the transition from the old tape to a new digital recording system would be an improvement, the DAR system will likely not free up the Immigration Judges to concentrate on their duties as adjudicators. Furthermore, it is unclear whether the DAR system will be able to adequately address the issue of clearly capturing overlapping speakers, or speakers with foreign accents. Can you tell us whether DOJ has considered using court reporters, rather than moving to a DAR system?

    a) If you did consider this option and decided against it, please explain why DOJ chose the DAR system over court reporters.
    b) Also, please explain how the DAR will improve the problem with clearly capturing overlapping speakers and/or speakers with foreign accents.

Backlog on Remanded Cases:

28. The Committee has recently been made aware of unreasonable delays at the Board of Immigration Appeals (BIA) with respect to cases remanded by the Circuit Court of Appeals. We have been informed of numerous cases, including cases involving detained respondents, where the BIA has taken from six months to over one year to take action

after a remand. These delays appear to occur even in cases where the only BIA action required is a further remand of proceedings to an immigration judge. What process does DOJ (including the BIA, the Office of Immigration Litigation, and the Solicitor General) employ following a remand to the BIA from the Circuit Court of Appeals?

a) Considering that the United States has a maximum of 90 days to seek rehearing or file a petition for certiorari with the Supreme Court, why should the BIA take any longer than four months to file a briefing schedule or remand the case for further proceedings to an immigration judge?
b) What is being done to ensure that the BIA moves on remanded cases—especially when the respondent is detained—as quickly as possible?

FBI Name Check Backlogs for USCIS Applications

29. FBI conducts name checks for U.S. Citizenship and Immigration Services (USCIS), which uses the results, in addition to other criminal, immigration and national security checks, to complete adjudication of certain applications for immigration benefits, including naturalization and adjustment of status. As you are aware, there are over 300,000 USCIS requests for name checks pending with FBI. Of those, over 130,000 have been pending for more than six months, 46,000 have been pending for two years, and 25,000 have been pending for more than 33 months. Because of the delays in processing name checks, approximately 4,500 law suits, including at least eight class actions, have been filed seeking mandamus relief. U.S. Attorneys and the Office of Immigration Litigation (OIL) are called on to defend these actions.

a) How many USCIS-requested name checks are currently pending with FBI?
b) How many have been pending for more than six months? Over one year? Over two years? Over three years? Over four years?
c) In both raw number and percentage terms, what is the incidence of "hits" the FBI finds in connection with USCIS name check requests?
   i) What are the most common reasons for these "hits"?
d) What steps is DOJ taking to reduce the backlog of FBI name checks?
e) What steps is DOJ taking to digitize the files it uses to conduct name checks?
f) What steps is DOJ taking to permit electronic name check searches?
g) What is the timeline for completion of digitization and electronic search capability?
h) In terms of man hours and cost, what resources is DOJ devoting to defending law suits relating to FBI name check delays?

Board of Immigration Appeals decision in Matter of A-T, 24I. & N. Dec. 296 (BIA 2007)

30. You have yet to respond to the letter that Chairwoman Lofgren and I sent you on January 28 concerning the Board of Immigration Appeals decision in *Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007). That decision will have devastating consequences for women who have suffered or are facing female genital mutilation, forced marriage, and other human rights abuses. Please respond to the concerns raised in that letter and let us know how the DOJ intends to address the BIA's unsupported and ill-advised reversal in U.S. policy with respect to the fundamental human rights of women. I have included the letter for your reference.

Former Governor Don Siegelman's Prosecution

31. Nick Bailey, a former aide to Governor Don Siegelman, was the government's primary witness in the prosecution of Governor Siegelman. In a "60 Minutes" piece that aired on February 24, 2008, Mr. Bailey indicated that before the Siegelman trial, he spoke to prosecutors more than seventy (70) times, and he admitted that during those conversations he had trouble remembering details. He also told "60 Minutes" that the prosecutors were so frustrated that they made him write his proposed testimony repeatedly under he got his story straight.

    a) How many times did Department prosecutors speak to Nick Bailey about the Siegelman case?

    b) Why was it necessary to speak to Mr. Bailey so many times? Please explain.

        i) Is that ordinary practice? Please explain.

    c) Did Department prosecutors in the Siegelman case require Mr. Bailey to "get his story straight" by writing his proposed testimony over and over? Please explain.

    d) Did Department prosecutors turn over Mr. Bailey's notes to Governor Siegelman's attorneys? If not, why not?

    e) If Department prosecutors did not turn over Mr. Bailey's notes, should they have in accordance with the law? If not, why not?

Voting Rights Enforcement

32. Historically, vote caging schemes have been used to suppress minority votes. When allegations of vote caging occurred in 1990 the DOJ took swift action, sending the FBI out immediately to investigate. The Department filed a federal lawsuit against the GOP

and Helms' campaign and obtained declaratory and injunctive relief in the form of a consent judgment and decree.

a) What is the Department's position on whether vote caging is a violation of civil rights laws?

   i) Has the Department's position against vote caging changed since 1990?

b) There were complaints of vote caging in Florida, Nevada, Wisconsin, and Ohio in 2004. How many "vote caging" investigations were initiated by the DOJ in response to these complaints?

   i) Were there any prosecutions? If not, why?

c) How do you plan to address complaints of vote caging during the upcoming election cycle?

33. What plans are being made by the Department to prepare for the upcoming 2008 presidential election to prevent voting rights violations, specifically vote suppression?

34. In a recent vote suppression hearing, the Judiciary Committee received statements from many organizations including the National Association for the Advancement of Colored People (NAACP), Mexican American Legal Defense and Education Fund (MALDEF), American Civil Liberties Union (ACLU), Asian American Legal Defense and Education Fund, Asian American Justice Center (AAJC), DEMOS, Project Vote, Campaign Legal Center indicating voter suppression is a major problem in the communities they represent. While the Department has been placed significant focus on voter fraud, it appears that the Voting Section of the Civil Rights Division has neglected its duty to fully enforce Section 2 of the Voting Rights Act, a provision largely aimed at combating racial discrimination in the voting process.

a) What level of resources do you intend to devote to voter suppression cases as compared to voter fraud prosecutions?

b) Will combating voter suppression be a priority for the Department in the 2008 Presidential election? If not, why?

35. Enforcement of Section 7 of the National Voter Registration Act (Motor Voter) is key to providing greater assess to voting. The Association of Community Organizations for Reform Now (ACORN), Demos, and Project Vote reported that voter registration applications from public assistance agencies nationwide have declined by 59.6% since 1995, while applications from all other sources have increased by 22%." A decline in registration applications from public assistance agencies has occurred in 36 of 41

reporting states since 1995.[5] What efforts is the Department making to ensure that states are complying with Section 7 of the National Voter Registration Act?

36. The U.S. Supreme recently heard arguments in the *Crawford v. Marion County Election Board* case. The suit challenges Indiana legislation requiring voters to provide photo ID, charging that it creates an unconstitutional burden on voters. Given the Department's history of opposing photo identification requirements for voting when the law does not include a fail safe provision for those without identification, why did the Department choose to file a brief in support of the Indiana law in the *Crawford* case?

[5]ACORN, Demos, & Project Vote, *Ten Years Later: A Promise Unfulfilled, available at* http://projectvote.org/fileadmin/ProjectVote/pdfs/Tens_Years_Later_A_Promise_Unfulfilled.pdf(Sept. 2005).

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary/

January 31, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

One week from today, you will testify for the first time before the House Judiciary Committee. I very much look forward to a frank and productive discussion that will shed light on your approach to the challenging issues facing the Department of Justice (DOJ) and our nation at this time. In order to make the most of our limited time, I am sending the following questions about issues of interest to myself and other Committee members. We would appreciate receiving your responses, along with your prepared testimony, no later than the close of business on February 5, 2008, so that all Committee members may have an opportunity to review them before you testify next week. In addition, please provide responses to the previous Committee letters to which there has not yet been a response, including letters to the Department of May 8, November 9 and December 20, 2007 and January 10, January 15, January 23, and January 29, 2008.

1. **Politicization of the Department of Justice** - Former Reagan Attorney General Richard Thornburgh is just one of a number of former DOJ officials who have expressed concern about the politicization of the Department in recent years, including U.S. Attorneys' offices, as reflected in the forced resignation of U.S. Attorneys in 2006 and other events.

    a. In addition to your revisions to DOJ policy concerning contacts between DOJ personnel and White House officials regarding pending matters, which I commend, describe any other steps you have taken to address this concern, whether with respect to the hiring of career personnel, restoring the traditionally apolitical approach to prosecution of the U.S. Attorney corps, communicating to the entire Department and the public that partisan politics must be checked at the door, or otherwise.

b. The website TPMMuckraker, which played an important role in providing information to the public concerning the U.S. Attorney scandal, revealed that it has recently been removed from DOJ's press release email distribution list. Who made this decision and why, and was there a change in policy in press release distribution after you became Attorney General?

2. **Waterboarding and Torture** – Your January 29, 2008, letter to the Chairman and members of the Senate Judiciary Committee, which preceded your Senate testimony on the same topic the following day, states that "There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question."

a. What specific "current law" were you referring to that would prohibit waterboarding "in some circumstances"? What "circumstances" were you referring to?

b. Are there any circumstances in which you believe that the waterboarding of a captured American soldier would be lawful?

c. Yesterday, Senator Durbin asked if you had reviewed a 2005 legal opinion that the New York Times described as providing "explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures."[1] This memorandum, authored along with others in this period by Steven Bradbury, was apparently approved by former Attorney General Gonzales over the objections of his Deputy Jim Comey, who stated that the Department would be "ashamed" if it became public. You indicated that you had not reviewed these memoranda but that you would do so. I urge you to complete that review and state whether you agree with the legal reasoning that they contain and would have approved the opinion.

3. **Selective Prosecution** – During your confirmation hearing before the Senate Judiciary Committee, you pledged in response to a question from Senator Schumer to look into the Siegelman prosecution in Alabama, which was the subject in part of a Joint Hearing of two House Judiciary Subcommittees. You also stated that you would review a recent study finding that, during the Bush

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[1] Shane, Johnston, and Risen, *Secret U.S. Endorsement of Severe Interrogations*, New York Times, Oct. 4, 2007.

Administration, Democratic officeholders have been investigated by Department prosecutors six times more often than Republicans.

a. Please describe what steps you have taken to familiarize yourself with the Siegelman matter, including the allegations of politicization that Senator Schumer referenced in his question to you? Did you review the record of our Subcommittees' Joint Hearing on October 23, 2007?

b. Have you taken any actions or formed any views about that matter and the allegations of political pressure referred to by Senator Schumer and discussed at our hearing?

c. Please describe what steps you have taken to familiarize yourself with the study regarding the relative frequency of investigations of Democrats and Republicans. Have you taken any actions or formed any views about that issue in response to your review of the study?

4. **Investigation Into Destruction of CIA Tapes –** Justice Department regulations require you to appoint an outside special counsel when: 1) a "criminal investigation of a person or matter is warranted," 2) the investigation "by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department," and 3) "it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." Although you have publicly stated that you do not intend to appoint a special prosecutor to investigate whether the CIA violated the law when it destroyed videotapes of terrorist suspect interrogations, please address the following questions.

a. In light of the fact that the Department may have been consulted on matters and decisions which are central to the investigation, why do you believe that this matter poses no risk of a conflict of interest for the Department and that the appointment of a special counsel from outside the government would not be in the public interest?

b. What is the scope of AUSA Durham's investigative authority and reporting requirements and have any limitations on the investigation's scope, jurisdiction, subject matter and methods been placed on him? In particular, although you testified yesterday that he may investigate the issue of what was shown on the tapes as part of the motive for their destruction, does the scope of the investigation include the legality of the conduct shown on the tapes

and of the alleged failure to provide the tapes to the 9/11 Commission or to any federal court?

c. What attorney and other resources will be dedicated to the investigation?

d. What role and authority will the Deputy Attorney General have in this investigation?

5. **Vote Suppression and Civil Rights Enforcement** – In remarks you made at a Martin Luther King, Jr. Day Prayer Breakfast on January 9th, you said that vigorous, fair, and impartial enforcement of the civil rights laws is among your "top priorities" as Attorney General. You also stated that the Civil Rights Division will play a crucial role through monitors and other means in assuring that the laws are scrupulously observed as our nation chooses a new President.

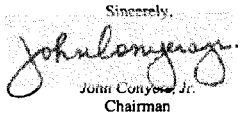
a. Despite complaints of voter suppression and intimidation, this Administration has brought fewer cases under Section 2 of the Voting Rights Act, and brought them at a significantly lower rate, than any other administration since 1982. What are your plans for ensuring that Section 2 is vigorously enforced and enforced in a fair and impartial manner?

b.. What actions is the Department preparing to take to address complaints of caging, intimidation, and other campaign tactics intended to suppress the minority vote?

c. As we approach the 2008 Presidential election and the 2010 Census, there will likely be an upsurge in submissions under Section 5 of the Voting Rights Act. What steps are being taken to prepare for and respond to an increase in Section 5 submissions?

Please send your responses to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, D.C. 20515 (tel.: 202-225-3951; fax: 202-225-7680). Thank you for your prompt attention to this matter, and we look forward to hearing from you next week.

Sincerely,



John Conyers, Jr.
Chairman

cc: Honorable Lamar S. Smith

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-0216
(202) 225-3951

January 28, 2008

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

We are extremely concerned over a recent decision by the Board of Immigration Appeals (BIA) that appears to reverse U.S. policy regarding the protection of women subjected to severe human rights abuses such as female genital mutilation (FGM) and forced marriage. In a recent decision, *Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007), the BIA denied asylum and withholding of removal to a woman who had experienced FGM as a child in Mali and feared the further abuse of forced marriage. We strongly question the Board's reasoning in that decision, and we urge you to certify the case for further review.

As a preliminary matter, it should be noted that FGM is a reprehensible act and a gross violation of a woman's fundamental human rights. The procedure is intended to oppress and subjugate women through mutilation and sexual repression. *See Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (citing evidence that FGM is "a form of sexual oppression that is based on the manipulation of women's sexuality in order to assure male dominance and exploitation"). Moreover, the procedure often results in severe physical and psychological damage, including hemorrhage, shock, chronic urinary or pelvic infection, sterility, painful scars and obstructed labor, sexual dysfunction, depression, and various other gynecological and obstetric problems. Congress has criminalized the practice of FGM in this country, and the House of Representatives recently denounced FGM as a "barbaric practice" in H. Res. 32, which passed the House unanimously.

Due to the heinousness of FGM and the "risk of serious, potentially life-threatening complications" to women and girls, the BIA has previously held that FGM can support a grant of asylum. *Kasinga*, 21 I. & N. Dec. at 361. The *Kasinga* Board recognized FGM as a form of persecution and determined that women who fear being subjected to FGM may be members of a "particular social group" under our refugee laws.

Id. at 365-66. The Board thus approved the grant of asylum to the applicant in the case, a woman who feared she would be subjected to FGM if returned to Togo.

In *Matter of A-T-*, the BIA was presented with a woman from Mali who had already been subject to female genital mutilation. The Board recognized that once an applicant has shown past persecution, she is presumed to have a well-founded fear of future persecution. *A-T-*, 24 I. & N. Dec. at 297. But it determined in this case that the FGM procedure itself constituted a *changed circumstance* that rebutted the presumption. The Board concluded that the procedure represented a "fundamental change" in the applicant's situation such that she no longer had a well-founded fear of persecution. *Id.* at 299-301.

This conclusion appears to conflict with the reasoning in *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003), a BIA decision concerning forced sterilization in the People's Republic of China. In that case, the Board held that the act of forced sterilization did not constitute a "fundamental change in circumstances" that would preclude the granting of asylum to a sterilized woman, even if such persecution could not be repeated. *Y-T-L-*, 23 I. & N. Dec. at 606. The Board noted that it would be "anomalous" for the act of persecution itself to "constitute the change in circumstances that would result in the denial of asylum." *Id.* at 605.

In the *A-T-* decision, the BIA appears to have backed away from its reasoning in *Y-T-L-* by distinguishing forced FGM from forced sterilization. The Board referred to the "refugee" definition in section 101(a)(42) of the Immigration and Nationality Act (INA), noting that Congress had specifically referred to forced sterilization and abortion in the definition. *A-T-*, 24 I. & N. Dec. at 300. The Board then concluded that "persons who suffered such harm [were] singled out by Congress as having a basis for asylum in the 'refugee' definition . . . on the strength of the past harm alone." *Id.* Because Congress had not referred to FGM, the Board reasoned, Congress had not intended for FGM to serve as a basis for asylum on past harm alone. *Id.* at 300-01.

The Board's reasoning in this regard is highly questionable, as Congress never intended to create a distinction between FGM and forced sterilization or abortion through the "refugee" definition. To the contrary, in referring to forced sterilization and abortion in the definition, Congress actually meant to *equate* such forms of persecution with FGM. The references to forced sterilization and abortion were meant to ensure that such acts were understood as persecution, a determination that the BIA had already made with respect to FGM in *Kasinga* and which obviated the need for further clarification by Congress. *See* INA § 101(a)(42); *Kasinga*, 21 I. & N. Dec. at 365-66. The *A-T-* Board appears to err when it concludes that Congress had meant to create an exception to general refugee law with respect to forced sterilization and abortion.

Nowhere does the refugee definition state that victims of these procedures are automatically eligible for asylum. The definition is simply meant to ensure that those procedures are understood as persecution, which, as noted above, had already been determined by the BIA with respect to FGM. The BIA's attempt to differentiate FGM from forced sterilization appears unsupported by the INA.

We believe that the reasoning in *Y-T-L-* with respect to forced sterilization should be applied in *A-T-* with respect to forced FGM. In *Y-T-L-*, the Board reasoned that:

> forced sterilization should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.

Y-T-L-, 23 I. & N. Dec. at 607. Such reasoning appears to be applicable in the *A-T-* case, as the continuing effects of FGM appear to be similar to those of forced sterilization:

> FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.

Kasinga, 21 I. & N. Dec. at 361.

We are also concerned that the BIA's treatment of forced marriage in *A-T-* further undermines human rights protections for women in the United States. The Board failed to see the threat of forced marriage in Mali as a form of persecution, particularly in light of her experience with FGM in Mali. It is our understanding that women subjected to forced marriage in Mali are vulnerable to severe abuse and deprivation of freedom. As such, forced marriage may be related to FGM in that it subjugates and oppresses women by controlling sexuality. It appears the Board failed to consider cumulatively all of the circumstances in the applicant's case.

We believe that the BIA's decision in *A-T-* is deeply flawed and serves as an inadequate vehicle for such a significant reversal in U.S. policy with regard to the fundamental human rights of women. The Board has failed to recognize that harms

unique to women - such as FGM and forced marriage - may constitute persecution entitling a woman to protection. We urge you to address this decision and its devastating consequences for the protection of women fleeing severe human rights abuses.

Sincerely,

John Conyers, Jr.
Chairman
Committee on the Judiciary

Zoe Lofgren
Chairwoman
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

cc: The Honorable Lamar S. Smith
The Honorable Steve King

QUESTIONS SUBMITTED BY REP. ROBERT C. "BOBBY" SCOTT
CHAIRMAN, SUBCOMMITTEE ON CRIME, TERRORISM
AND HOMELAND SECURITY

1. The Inspector General released a report in December 2007 that details the results of a seven-month investigation of the Office of the Pardon Attorney and lays out allegations of racism, intimidation, and mismanagement. What is the Department's official position on the findings of the Inspector General; in particular, the alleged misconduct of former Pardon Attorney Chief, Roger Adams? In addition, since part of the Office of the Pardon Attorney's task is to deal with pardon petitions in a timely manner, why is there such a significant backlog of cases that has led to waits of two, three, four, and as long as seven years before decisions are reached on petitions? What does the Department plan to do to resolve this problem?

2. During the oversight hearing on February 7, 2008, you stated that the Department of Justice will not enforce contempt citations for ignoring Congressional subpoenas against either White House Chief of Staff, Joshua Bolten, or former White House Counsel, Harriet Miers, because the President has ordered that neither Mr. Bolten nor Ms. Miers comply with the subpoenas on the basis of executive privilege. The relevant statute on enforcement of contempt citations states, in reference to the U.S. Attorney's responsibility, "whose duty it shall be to bring the matter before the grand jury for its action." Since this statutory language does not appear to leave the U.S. Attorney with discretion as to enforcement, what is the legal basis for your telling the U.S. Attorney for the District of Columbia not to present contempt citations to a grand jury as authorized by the U.S. House? Can executive privilege be claimed by the President to withhold the testimony of Administration aides when the President was not part of the conversations and has no knowledge of the matters that will be the basis of the testimony?

3. The Crime Sub-Committee was very disappointed that the Department of Justice did not send a witness to a hearing on Protecting Overseas Contractors, such as rape victim Jamie Leigh Jones, despite an invitation, since the Department is responsible for investigating and prosecuting MEJA cases, such as those involving sexual assault. How many MEJA cases have been referred to the Department and how many involve sexual assault? What steps has the Department taken to ensure that overseas contractor cases, like the sexual assault on Jamie Leigh Jones, are being thoroughly investigated and receiving due consideration for prosecution?

4. During your confirmation hearing before the Senate Judiciary Committee, you stated that you would look into a finding that, during the Bush Administration, state and federal Democratic officeholders have been investigated by Department of Justice prosecutors six times more often than Republicans. That finding is included in a study by Professor Emeritus, Donald C. Shields, Ph.D., University of Missouri - Kansas City, and is entitled, "An Empirical Examination of the Political Profiling of Elected Officials: A Report on Selective Investigations and/or Indictments by the DOJ's U.S. Attorneys under Attorneys General Ashcroft and Gonzales." What steps have you taken in response to your promise to review that study?

5. At the February 7, 2008 hearing before the House Judiciary Committee, you indicated that you would provide the information supporting your contention that most of the people who may be released early as a result of the Sentencing Commission's decision to apply its crack cocaine sentencing guideline adjustments retroactively are violent offenders. Please identify the cases you are referring to and what causes you to conclude they are violent offenders that pose a threat of violence to the public if released earlier than they are now scheduled for release. Will these offenders also pose the same threat if they are released as currently scheduled, and if not, why not, and if so, what plans has the Department made to protect the public at that time that cannot now be implemented?

6. It is not uncommon for articles to appear in newspapers that suggest that serious violations of civil rights have occurred. If a member of a Congressional Committee or Subcommittee with oversight authority over the Department of Justice (DOJ) views the allegations as serious and brings such an article to the attention of DOJ requesting a review of the situation, can we rely on DOJ to assess the situation sufficiently to determine whether there is an issue warranting a civil rights investigation, or should we expect DOJ to ignore the member's request?

7. On February 25, 2007, Americans United for Separation of Church and State sent a letter to the Department of Justice and three other cabinet departments challenging the constitutionality of ten earmarks designated for religious institutions and raising constitutional concerns about sixteen others. The letter is attached hereto. Please identify what actions you intend to take in response to this letter. When do you plan to issue a formal response to the letter? Have any of these earmarks already been paid out? When are these earmarks scheduled to be paid out? If you are uncertain about exact timing, please give approximate timeframes in response to this and any other questions concerning timing. Do you plan to delay payment of the earmarks while you investigate the allegations in the letter? If so, for how long? What is your substantive response to the allegations in the letter that ten of the earmarks appear unconstitutional and sixteen other ones raise serious constitutional issues? What documents do the Department of Justice and the three other affected cabinet departments have in their possession that relate to these earmarks and/or the institutions or programs that are to be funded by the earmarks? Please provide the Committee with all documents relating to the 26 earmarks, including but not limited to any correspondence concerning the earmarks (including both internal correspondence/memoranda and correspondence with the entities to be funded, and including electronic correspondence), grant applications relating to the earmarks, grant agreements or contracts relating to the earmarks, payment records relating to the earmarks, and all other documents in each department's files concerning each earmark.

AMERICANS UNITED
for Separation of Church and State

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February 25, 2008

VIA U.S. MAIL AND FAX

Michael Mukasey, Attorney General
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Alfonso Jackson, Secretary
Department of Housing and Urban Development
471 7th St., SW
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FAX: (202) 708-1160

Michael O. Leavitt, Secretary
Dept. of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201
FAX: (202) 401-3463

Margaret Spellings, Secretary
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
FAX: (202) 401-0596

Re: Federal earmarks for religious activities

Dear Attorney General Mukasey, Secretary Leavitt, Secretary Jackson, and Secretary Spellings:

In reviewing recent congressional earmarks for fiscal year 2008, we identified many that raise concerns in light of the Establishment Clause of the First Amendment to the U.S. Constitution and the applicable federal regulations. We ask that you carefully investigate these earmarks and issue them only if sufficient restrictions can be imposed on the earmarks to ensure that they satisfy all the relevant legal requirements.

Americans United for Separation of Church and State is a nonsectarian, nonpartisan, nonprofit organization that works to preserve religious liberty through advocacy on a wide range of political and social issues. Our allies include many houses of worship and other religious bodies; and our membership of over 75,000 consists of individuals of nearly every imaginable faith, as well as those of no faith at all, and includes thousands of clergy members. We strongly believe that religious institutions play a vital role in American society, and we applaud the work that many such institutions perform in providing much-needed social services to our country's most disadvantaged citizens. We emphasize, however, that in considering whether to fund the efforts of such organizations, the government must be mindful of the fundamental constitutional principle of separation of church and state. Our emphasis on the importance of this separation is not motivated by hostility to religion: to the contrary, we believe that such separation is essential if religious institutions are to retain their integrity and autonomy, and therefore to continue to flourish.

With these values in mind, we provide the following information in the hopes that it will allow you to make an informed decision regarding the legality of funding the identified institutions and programs.

Constitutional Requirements:

The Establishment Clause of the First Amendment to the U.S. Constitution prohibits the provision of public funds for religious activities, such as religious worship or instruction. *See Mitchell v. Helms*, 530 U.S. 793, 840-41, 857, 861 (2000) (O'Connor, J., concurring); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Similarly, public funds may not be granted to groups that discriminate on the basis of religion among service recipients (*see Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007)) or that coerce program participants to engage in religious activities (*see DeStefano v. Emergency Hous. Group Inc.*, 247 F.3d 379, 412 (2d Cir. 2001)).

In addition, the Establishment Clause forbids the government from making direct cash payments to pervasively sectarian institutions. *See Bowen*, 487 U.S. at 610-12, 621; *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976); *Hunt*, 413 U.S. at 743. An institution is "pervasively sectarian" if its "secular activities cannot be separated from sectarian ones" (*Roemer*, 426 U.S. at 755) or "a substantial portion of its functions are subsumed in the religious mission" (*Hunt*, 413 U.S. at 743). Recent circuit decisions have split over whether the "pervasively sectarian" test remains good law: Although the Sixth Circuit has affirmed the continued vitality of the test (*Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 408-09 (6th Cir. 2002); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 (6th Cir. 2001)), the Fourth Circuit has held that the test is no longer applicable (*Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001)). But only the Supreme Court can overrule its previous decisions establishing the "pervasively sectarian" test (*see Agostini v. Felton*, 521 U.S. 203, 237 (1997)), and the Court has not done so. Thus, that test remains the law in most jurisdictions — including the D.C. Circuit, which has not spoken on the issue — and we respectfully disagree with the Fourth Circuit's perspective.

Furthermore, when providing grants to faith-based organizations, it is the government's responsibility to put in place "effective means of guaranteeing that the [grants] will be used exclusively for secular, neutral, and nonideological purposes." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *accord Freedom from Religion Found. v. Bugher*, 249 F.3d 606, 614 (7th Cir. 2001). At a minimum, to ensure that aid is not used improperly, government officials should require aid recipients to submit written applications with specific project plans and signed assurances that aid will be used only for secular purposes. *See Mitchell*, 530 U.S. at 861-63 (O'Connor, J., concurring); *Roemer*, 426 U.S. at 741-42. Additionally, government officials should conduct on-site monitoring visits of the funded programs or entities. *See Mitchell*, 530 U.S. at 861-63 (O'Connor, J., concurring); *Americans United*, 509 F.3d at 425; *Bugher*, 249 F.3d at 613.

Regulatory Provisions:

Applicable federal regulations have requirements similar to those of the U.S. Constitution, prohibiting federal funding of programs that have religious content, that discriminate among service recipients based on religion, or that coerce service recipients to engage in religious activity. Specifically, the relevant regulations for each of your departments provide as follows:

Department of Justice. DOJ regulations provide that "[o]rganizations that receive direct financial assistance from [DOJ] under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services" for which DOJ funds are used. 28 C.F.R. § 38.1(b)(1) & § 38.2(b)(1). Any inherently religious activities "must be offered separately, in time or location, from the programs, activities, or services funded with direct financial assistance from [DOJ], and participation must be voluntary for the beneficiaries of the programs, activities or services provided under the program." *Id.* An organization that receives funding "shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief." *Id.* § 38.1(d) & § 38.2(d).

Department of Housing and Urban Development. HUD regulations state that "[o]rganizations that receive direct HUD funds under a HUD program or activity may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded under a HUD program activity." 24 C.F.R. § 5.109(c). Any inherently religious activities "must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds and participation must be voluntary for the beneficiaries of the programs, activities or services provided under the HUD program." *Id.* Any HUD funding recipient "shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief." *Id.* § 5.109(f). Importantly, "HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities." *Id.* § 5.109(g).

Department of Health and Human Services. HHS regulations emphasize that no federal funds "may be expended for inherently religious activities, such as worship, religious instruction, or proselytization." Any such activities must be offered "separately, in time or location, from the programs or services for which [the grantee] receives funds . . . and participation must be voluntary for the program beneficiaries." 42 C.F.R. § 54.4. All funding recipients "shall not, in providing program services or engaging in outreach activities under applicable programs, discriminate against a program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice." *Id.* § 54.7.

Department of Education. In discussing grant eligibility, the regulations explain that "[a] private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a grant from the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the grant must be voluntary." 34 C.F.R. § 75.52. No grant monies may be used for "[r]eligious worship, instruction, or proselytization" or "[e]quipment or supplies" for such activities. *Id.* § 75.532. The regulations also explain that "[a] private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a recipient." *Id.* § 74.44(f)(3).

Moreover, "participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program." *Id.*

Earmarks that Appear to Violate the Constitution:

The available information indicates that the following earmarks appear to run afoul of constitutional and regulatory requirements because they would fund programs with religious content, organizations that discriminate on the basis of religion, or programs that coerce participants to engage in religious activities. The Executive Branch has both inherent constitutional authority and statutory authority to impound Congressionally authorized spending that would violate the Constitution. *See Brown v. Califano*, 627 F.2d 1221, 1236 n.90 (D.C. Cir. 1980); 2 U.S.C. § 683. We accordingly ask that you refrain from disbursing these earmarks entirely, unless, after careful and thorough investigation, you determine that the earmarked funds will be restricted to purely secular uses and that the earmarks will otherwise comply with constitutional and regulatory requirements. (Unless otherwise noted, quoted material is drawn from the organization's own website.)

Department of Justice

- ***Teen Challenge, Albany, New York.*** Albany Teen Challenge's At Risk Youth Drug Prevention Program was designated to receive a Juvenile Justice grant of $47,000 to be applied toward several programs, including "Rock the Block." The "Rock the Block" program is designed to "bring[] the life-changing message of salvation through Jesus Christ to the city streets." Teen Challenge's website describes the program: "Real life testimonies are given and the word of God is shared. An altar call is given and Bibles and salvation cards are distributed. Those who accept Christ as their savior are referred to the local partner churches, to help them grow with Christ and discover God's unique plan for their life."

- ***Teen Challenge, Lebanon, Indiana.*** Central Indiana Teen Challenge was earmarked to receive a Juvenile Justice grant of $94,000 "for expanding educational and vocational training to girls and young women who have completed addiction treatment." The website states: "We at Teen Challenge believe in the principles of Biblical counseling and in the fact that Christ-centered intervention can and will create life-changing results." The program employs an explicitly Christian curriculum (Accelerated Christian Education). The application for would-be participants inquires about details of their religious beliefs, including whether, where, and how often they attend church, whether anyone in their families attends church, and how they would describe their present relationship with God.

- ***Teen Challenge — New Hope Academy, Factoryville, Pennsylvania.*** New Hope Academy, a "Christian boarding school for youth with life controlling problems," was earmarked $211,500 "to expand its operations by providing reduced or no-cost addiction treatment services to low-income families." The Academy's "main goal . . . is to show you how to depend on God, and live a victorious life through Jesus Christ." Incoming students are

provided an advisor who "give[s] Biblically sound pastoral counseling." Students attend several church services each week. Students are banned from possessing printed material and music "that [is] not conductive to Christian growth." The Academy uses the Accelerated Christian Education curriculum, which is explicitly Christian and Bible-infused. For example, the social studies curriculum includes units on various biblical figures and stories. The science curriculum mandates that students "[v]iew[] the wonders of the Creator as he studies the structure and function of man's skin, skeleton, and muscles"; "[o]bserve[] scientific proof for Creation of fish, amphibians, reptiles, and invertebrates"; and "[u]se[] character stories to apply Scriptural principles to everyday situations."

- ***Teen Challenge, Minnesota.*** A Juvenile Justice grant of $235,000 was earmarked to Minnesota Teen Challenge "to assist Minnesota schools with their drug and alcohol prevention programs." The organization's website lists its objective as "assist[ing] teens and adults in gaining freedom from chemical addiction by applying Biblical principles in establishing a chemical-free lifestyle, enhancing social skills, improving work habits, building supportive relationships, and growing in personal relationship with Jesus Christ."

- ***World Impact Youth Program, St. Louis, Missouri.*** World Impact was designated $282,000 through the Juvenile Justice Fund to "enhance programs designed to help meet the needs of low-income, at-risk youths." World Impact's website describes it as "a Christian missions organization seeking to reach the unchurched urban poor in the inner cities of America." It is explicitly evangelical, explaining that its aim is to "present Christ to the unchurched through all our ministries," "nurture people to maturity in Christ," and "train them to teach others."

- ***Detroit Rescue Mission Ministries, Detroit, Michigan.*** Detroit Rescue Mission Ministries was allocated $490,000 for its Wildwood Ranch Youth Program, a five-day summer camping program. Its website describes the program as a "Christian summer camping experience." The organization "is committed to sharing the gospel of the love of Jesus Christ, providing hope to the hopeless, disadvantaged, abused and homeless men, women and children of our community." Its website explains: "by ministering to the total person — body, soul and spirit — we help them become faithful Christians, discipled into a local church, rehabilitated, employed and living productive lives in restored families."

Housing and Urban Development

- ***Camp Barnabus, Purdy, Missouri.*** This "nondenominational Christian summer camp" was earmarked $375,000. The camp's website specifies that the volunteer staffers should be "ready to help us spread the good news of the gospel of Jesus Christ to all campers that come through our gates," and the application [for campers] asks: "How and when did you come to know Christ, and how would you describe your walk with the Lord?" It adds that "the foundation of our program is to teach the love of Christ to ALL."

- ***Dakota Boys & Girls Ranch, North Dakota.*** The program was designated $234,500 to "upgrade the mechanical heating and water lines, alarm system, and address accessibility concerns." The program is a Christian ministry whose "Christian, spiritual life programming includes spiritual life groups and activities, church attendance or other spiritual life assignments on Sundays, individual discussions with spiritual life staff or our chaplain or deaconess, and prayers at meals." Programming also may include "baptism, confirmation studies, devotions, bible studies, and other discussion groups."

- ***Jimmie Hale Mission, Birmingham, Alabama.*** The Mission was designated $250,000 for construction of the Jimmie Hale Mission Men's Center Education and Administration Building. The organization's mission is "to minister to the spiritual and physical needs of the poor and hurting in Jesus' name." The facility consists of "a 160-bed men's shelter, men's clothing distribution, nightly chapel services and a two-phase, residential recovery program" that includes "group and individual Bible studies."

- ***Morning Star Ranch, Florence, Kansas.*** Morning Star Ranch, which belongs to World Impact, was designated to receive $595,000 "to renovate facilities." World Impact's website explains that Morning Star Ranch is its "training center for inner-city young men ages 18-25." This program, known as the Christian Leadership Training Program, includes "Bible studies and devotions." The Ranch operates children's camps, the goals of which "are relationship building, evangelism, spiritual growth, and wholesome fun." The Morning Star Ranch facilities "are made available to all followers of Christ."

Earmarks That Warrant Close Scrutiny:

For the earmarks listed below, we have been unable to find sufficient information about the programs that this set of earmarks would fund to determine whether the grants would be lawful, but because the recipient organizations engage in substantial religious teaching, ministry, or other religious activity, the earmarks raise serious questions and concerns. Thus, we ask that you release these earmarks only if you can ensure that the grant funds will be restricted to secular activities and will not be used to support religious coercion or discrimination, and that the grants will otherwise comply with the constitutional and regulatory requirements described above. In addition, in the event that grant funds are disbursed, we ask that you stringently monitor the use of the grant monies to ensure compliance with the U.S. Constitution and applicable regulations.

Department of Justice

- ***Straight Ahead Ministries, Boston, Massachusetts.*** $94,000 was designated for Straight Ahead Ministries' Ready4Work program. Straight Ahead Ministries' mission is "[t]o see Jesus Christ transform the lives of juvenile offenders." It seeks to see "[e]very juvenile institution opened to ministry; every juvenile offender given the opportunity to hear and respond to the Gospel; every Christian called to juvenile offender ministry trained; every believing juvenile offender offered discipleship." Broadly, Ready4Work is "a pilot

demonstration site for faith-based re-entry programs with youth coming out of lock-up into the community," which provides "educational services, job training, mentoring, and intensive case management."

- ***New Song Urban Ministries, Inc., Baltimore, Maryland.*** A grant of $401,850 "for comprehensive services to at-risk youth" was designated for the ministry. New Song's website explains that it embraces "a holistic approach to neighborhood development known as church-based Christian community development (CCDA)," and that it is affiliated with New Song Community Church, which "is the basis for all of the ministries under the New Song Urban Ministries Umbrella." The Christian Community Development Association website, which New Song's website lists as a link, explains: "It is practically impossible to do effective wholistic [sic] ministry apart from the local church. A nurturing community of faith can best provide the thrusts of evangelism, discipleship, spiritual accountability, and relationships by which disciples grow in their walk with God."

- ***Abundant Life Church of God Family and Group Counseling Program, Holbrook, New York.*** The Abundant Life Church was designated a grant of $94,000 for "family and group counseling to improve parent-child communication and to increase anti-gang awareness." Abundant Life is a Christian church whose website demonstrates adherence to Christian doctrine.

- ***Grace College, Winona Lake, Indiana.*** $1,128,000 was earmarked for Grace College for funding "to train professional emergency responders for local disasters and emergencies." The college's website describes it as an "evangelical Christian liberal arts college," whose "goal in Christian living and teaching is to make Christ preeminent in all things." The application for admission to the college instructs applicants to provide the name of their church and pastor, and includes an essay question that reads: "Please describe your relationship with Jesus Christ as Savior and Lord. Describe how and when that relationship began and the influences that are contributing to your spiritual developments." It also notes that "regular attendance at chapel and Sunday services (in an evangelical church) is required of all full-time students."

- ***Denver Rescue Mission, Denver, Colorado.*** The Denver Rescue Mission's Strategic Transition and Response (STAR) program was slated to receive $282,000. The Mission describes itself as a "full-service Christian charity." Although its website does not provide specific information about the STAR program, another program — the New Life program — incorporates "chapel services, prayer, Bible study, and involvement in a local church," and lists "Christian counseling" by professional counselors and chaplains as one of its components.

- ***Holy Family Institute, Pittsburgh, Pennsylvania.*** The Institute was earmarked $141,000 to "provide further at-risk youth services to the children it serves." Its website notes that the children and families it serves "come to us in search of a chance to heal, to feel safe, to

believe in themselves and in the goodness of God and humanity." It explains that its mission is to "empower children and families to lead responsible lives and develop healthy relationships built on faith, hope, and love."

- ***Operation UNITE, Kentucky.*** $3,572,000 was earmarked for "the extension of Operation UNITE, a drug enforcement, treatment and education program." Operation UNITE "has embraced the faith-based community as an integral part of its anti-drug initiative." It notes that "[f]aith plays a vital role in healing those affected by drug abuse," and states that its "faith-based program is designed to empower every church member with the knowledge and skill to be an active part in this fight against drugs by providing material for activities such as mentoring, education, youth curriculum, and prayer for intervention, prevention and after-care."

Housing and Urban Development

- ***Of One Accord Ministry, Tennessee.*** The ministry was earmarked $75,000 to renovate its food pantry. The ministry describes its mission as "a cooperative effort of area churches and agencies whose mission it is to identify and meet the needs of our community with the Love of Jesus." The ministry's application for food assistance asks whether the applicant has a church affiliation, and, if so, where he or she attends.

- ***New Song Urban Ministries, Inc., Baltimore, Maryland.*** A grant of $250,000 "for renovation and construction of the Community Learning Center" was designated for the ministry. Although it is unclear what the Community Learning Center is used for, New Song's website explains that it embraces "a holistic approach to neighborhood development known as church-based Christian community development (CCDA)," and that it is affiliated with New Song Community Church, which "is the basis for all of the ministries under the New Song Urban Ministries Umbrella." The Christian Community Development Association website, which New Song's website lists as a link, explains: "It is practically impossible to do effective wholistic [sic] ministry apart from the local church. A nurturing community of faith can best provide the thrusts of evangelism, discipleship, spiritual accountability, and relationships by which disciples grow in their walk with God."

- ***Saint Richard Parish, Chicago, Illinois.*** A grant of $250,000 "for construction, renovation and buildout of a new community center" was designated for Saint Richard Parish, a Catholic church in Chicago.

- ***Covenant House Alaska, Anchorage, Alaska.*** A grant of $280,000 "for facility construction" was designated for Covenant House, an organization providing services for runaway children and teens. The website references the organization's Christian values, and notes that "[m]inistry to the kids is an integral part of our mission at Covenant House Alaska. We recognize that we must serve the spiritual needs in addition to the physical needs."

- ***World Impact, St. Louis, Missouri.*** World Impact was designated to receive approximately $560,000 "to renovate the former YMCA North Building." The organization is "a Christian missions organization seeking to reach the unchurched urban poor in the inner cities of America." It is explicitly evangelical, explaining that its aim is to "present Christ to the unchurched through all our ministries," "nurture people to maturity in Christ," and "train them to teach others."

Health and Human Services

- ***Urban Family Council, Philadelphia, Pennsylvania.*** $66,000 was earmarked for Urban Family Council "for abstinence education and related services." Urban Family Council describes itself as a "faith-based non-profit community organization," and its website indicates that it has partnered with numerous local churches "to bring quality educational services to schools, churches, and other community groups in the city and surrounding areas."

- ***Grace College, Winona Lake, Indiana.*** Grace College was slated to receive a grant "to offer more opportunities to minority, disabled and non-traditional students." The college's website describes it as an "evangelical Christian liberal arts college," whose "goal in Christian living and teaching is to make Christ preeminent in all things." The application for admission to the college includes space for applicants to provide the name of their church and pastor, and an essay question that reads: "Please describe your relationship with Jesus Christ as Savior and Lord. Describe how and when that relationship began and the influences that are contributing to your spiritual developments." It also notes that "regular attendance at chapel and Sunday services (in an evangelical church) is required of all full-time students."

- ***Covenant House Florida, Ft. Lauderdale, Florida.*** A grant of $195,000 "for a program for pregnant and parenting teens and young adults" was designated for Covenant House Florida. Covenant House's website describes it as a Catholic agency, and it is endorsed by the Catholic church. This religious affiliation reflects Covenant House's "unequivocally pro-life" position. Although Covenant House states that it does not evangelize youth or staff, it "offer[s] pastoral ministry to those who want to participate."

Department of Education

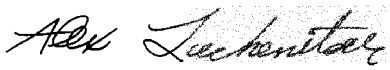
- ***Grace College, Winona Lake, Indiana.*** Grace College was designated to receive a FIPSE grant of $195,000 for "technology upgrades." The college's website describes it as an "evangelical Christian liberal arts college," whose "goal in Christian living and teaching is to make Christ preeminent in all things." The application for admission to the college includes space for applications to provide the name of their church and pastor, and an essay question that reads: "Please describe your relationship with Jesus Christ as Savior and Lord.

Describe how and when that relationship began and the influences that are contributing to your spiritual developments." It also notes that "regular attendance at chapel and Sunday services (in an evangelical church) is required of all full-time students."

* * *

Although the earmarks listed in this letter are of specific concern based on the information currently available to us, we wish to note that there are numerous fiscal year 2008 earmarks that we have not had an opportunity to investigate, and thus we ask that you evaluate *all* FY08 earmarks to ensure that they comply with constitutional and regulatory requirements. Because of the importance of the constitutional issues implicated by these earmarks, we ask that you please advise us within fifteen days of your intended actions with respect to those earmarks that are to be paid by your respective agencies. Please do not hesitate to contact us if you would like to discuss this matter.

Sincerely,



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QUESTIONS SUBMITTED BY REP. LINDA T. SÁNCHEZ
CHAIR, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Special Counsel

1. During the seven years of the Bush Administration, Members on this Committee have requested the appointment of independent special counsels dozens of times, including requests to investigate the leak of a covert CIA agent as well as the destruction of videotapes depicting waterboarding. Despite these requests, this Administration has never appointed a special counsel under the regulations.

a. Do you think the special counsel regulations serve a purpose?
   i. If yes, why are they routinely disregarded by the Department?
   ii. If no, why not?

b. Should Congress bring back the Independent Counsel Statute or a similar mechanism to ensure that an investigation is sufficiently independent when the Department has a conflict of interest? Why or why not?

2. At the House Judiciary Committee's oversight hearing of the Department of Justice, you testified that "waterboarding, because it was authorized to be part of the program, pursuant to approach -- that it was authorized to be part of the CIA program, cannot possibly be the subject of a criminal -- a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice."

a. Given the fact that you acknowledged a clear conflict of interest for the Department in investigating possible criminal violations by those who engaged in waterboarding, should a special counsel under the regulations be appointed to conduct a criminal investigation? Please explain.

Deferred Prosecution Agreements

1. Do you support the proposal that a federal monitor be selected by a third party district court judge or magistrate judge from a pool of pre qualified individuals or firms?

2. We know that deferred prosecution agreements for corporations date back at least to January 20, 2003 when Deputy Attorney General Larry Thompson first issued a Department memorandum instructing federal prosecutors to seek these agreements when possible. However, in the five years since that time, the Department of Justice has not issued any formal guidelines on this practice and has never outlined the parameters of such agreements. Therefore, attorneys cannot properly advise their corporate clients when such issues arise. Without explicit guidelines

for these agreements, federal prosecutors possess unmitigated discretion over deferred prosecution agreements.

a. Will you instruct the Department to issue explicit guidelines on deferred prosecution agreements that attorneys as well as the general public can rely upon?
   i. Why or why not?
   ii. If you plan to issue guidelines, when will they be implemented?

Politicization of the Department of Justice

1. Monica Goodling, former Senior Counsel to Attorney General Alberto Gonzales and the Department's White House Liaison, testified before this Committee that she crossed the line in taking party affiliation into account in the hiring of career Department of Justice employees. Although we still do not know the scope of the effort to populate career positions at the Department with partisans, I am concerned that many Department employees hired for an improper partisan purpose have been placed in career positions that will outlast the tenure of this Administration. What have you done to address this concern?

Immigration

1. The State Criminal Alien Assistance Program (SCAAP) reimburses states for the cost of detaining criminal aliens. The program recognizes that immigration is an issue demanding federal solution. Therefore, it is unfair to force states and localities to foot the bill for incarcerating these criminal aliens, bills that can often run high enough to deprive state and local law enforcement agencies of vital funds needed for new programs, equipment purchases and training.

In 2002, President Bush allocated $265 million for SCAAP in his budget. Since then, including the recently released FY2009 Budget, he has allocated nothing for this indispensable program in his budget.

a. Do you believe that it is important to reimburse states and localities for the cost of detaining criminal aliens?

b. If yes, did you request money for SCAAP when you submitted your budget request for FY2009?

c. Would you do so for the future, were you to retain your position as Attorney General?

d. Why do you believe the Bush Administration is abandoning state and local law enforcement agencies by refusing to reimburse funds that could be used for training, equipment

purchases, and new programs that make communities safer?

2. SCAAP has been chronically under-funded and reimburses states and localities for only a small portion of what they spend. The problems don't stop there; the program also significantly delays reimbursements crucial to their everyday functioning. Counties and states often can't afford to wait for these essential resources.

a. Do you believe that states and localities should have to wait for up to two years to receive their reimbursements? Please explain.

b. I have a bill that would ensure that every state and locality receives reimbursement for incarcerating criminal aliens in a timely manner, by requiring the Department of Justice to make reimbursements within 120 days of the application deadline. Would you be supportive of that deadline?

3. The 2007 Annual Report of the Ombudsman to USCIS indicates that FBI name checks are a significant source of case backlogs for immigrants seeking visas. In this year alone, the backlog of cases pending because of FBI name checks rose by 93,358. The number of cases pending for more than 33 months rose to 31,144, and increase of 44 percent.

a. Why are these backlogs increasing?

b. What can Congress do to help you speed up the process?

4. The name-check process does not differ if an individual has been in the United States for many years or a few days, if an individual has or has not traveled frequently to a country designated a State Sponsor of Terrorism, or even if the person is a member of the US military. Many individuals who are subject to lengthy name-checks already have green-cards and employment authorization documents.

a. Why has the FBI, in conjunction with the Department of Homeland Security, refused to implement a risk-based name-check process?

b. Have you had any discussions with Secretary Chertoff about implementing a risk-based name-check process to reduce backlogs?

c. If you do not favor risk-based name-checks, what specific steps will reduce the FBI backlog and allow the Bureau to process name-checks faster?

QUESTIONS SUBMITTED BY REP. KEITH ELLISON

1. Attorney General Muksasey, I want to bring your attention to investigations of the firing and hiring of US Attorneys.

   Yes or No, are you familiar with the case of Rachel Paulose?

2. I have in my possession a letter sent to your office dated January 25, 2008 from the Office of Special Counsel Scott Bloch that raises serious concerns about your office's conduct in dealing with Ms. Paulose's case.

   Let me quote from the letter:

   "I am writing you because we are impeded in our investigations of the US Department of Justice in several areas....in our investigation into political intrusion into personnel decision making, and in the matter of former U.S. Attorney Rachel Paulose."

   Specifically, Special Counsel Bloch claims that the response by your department has been insufficient and raises some serious issues concerning the conduct of your department:

   "On December 11, 2007, I received a letter from Associate Deputy Attorney General David Margolis regarding allegations from John Marti about USA Rachel Paulose... Mr. Margolis took issue with my finding of a substantial likelihood that USA Paulose grossly mismanaged her office, and abused her authority. He expressed strong disagreement with what he refers to my characterizations of USA Paulose's actions, and requested reconsideration of my finding."

   Special Counsel Bloch states:

   "The letter from Margolis does not meet the statutory criteria for investigation and reporting to me. Rather it expresses Mr. Margolis' opinion that the allegations, if true, do not constitute gross mismanagement and an abuse of authority. This is wholly insufficient and reflects a deliberate disregard for the law under which OSC operates and with which you are obligated to comply."

   Yes or No, have you responded to Mr. Bloch's letter?

3. AG Mukasey, what position does Rachel Paulose hold now in your Department?

4. What are Ms. Paulose's responsibilities?

5. Why was Ms. Paulose recalled to Washington DC?

Questions for Attorney General Mukasey
Submitted by Rep. Robert Goodlatte

1) The STOP! Initiative was created by this Administration and has been successful in coordinating interagency efforts against copyright piracy. However, this initiative is not permanent and could expire when a new President takes over in January. Do you believe that the STOP! Initiative has been successful? If so, does it make sense to establish a permanent effort to coordinate the prosecution of intellectual property violations among federal agencies that will survive the transition to new Administrations?

2) In my district, the 6th District of Virginia, we are seeing increased gang activity, especially among international gangs. This is extremely concerning to me and my constituents, and I have worked hard to help get federal, state and local law enforcement the resources necessary to combat these gangs.

Are gangs and gang violence still on the rise nationally? What challenges are you facing in combating street gangs, including international gangs, and what additional tools can Congress give the FBI to help eliminate the gang scourge in our society?

3) It appears that online pornography and obscenity are on the rise. I have been appauled to hear reports of websites like YouPorn.com and PornoTube.com, which let users upload and view hardcore sex videos in formats similar to Youtube. According to one Internet-ranking company, YouPorn.com even ranks higher than CNN.com, About.com and Weather.com in the average number of web visits per month.

With this easy access to hardcore pornography, children are much more likely to be exposed to it than they were, say 10 or 15 years ago. Is it still a DOJ priority to prosecute pornography and

obscenity crimes online? Are there any additional tools that Congress can give DOJ to help combat this growing scourge?

4) Increasingly, we are hearing reports about the serious problem of organized retail theft rings. Most recently, we heard of an organized retail crime ring bust involving 18 people and possibly $100 million worth of medicine and health and beauty goods from convenience and grocery stores. Does the Department see Organized Retail Crime as a serious concern and will the Department commit to working with Congress to find ways to address this growing problem?

LETTER DATED JUNE 2, 2008, FROM KEITH B. NELSON, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE, PROVIDING DOCUMENTS IN RESPONSE TO POST-HEARING QUESTIONS POSED BY THE HONORABLE ROBERT C. "BOBBY" SCOTT [1]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 2, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request for documents relating to 26 earmarks for FY 2008, including communications with entities to be funded, as set forth in Question 95 of the Questions for the Record following the Attorney General's testimony before the Committee on February 7, 2008 (QFRs). We are providing these documents based upon conversations with Committee staff because of their particular interests to the Committee, and our responses to the remaining QFRs will be provided separately when the currently pending clearance process is completed.

As you may be aware, 13 of the 26 earmarks referenced in Question 95 involve Department of Justice grant funding. We have enclosed documents pertaining to these 13 earmarks, which number 195 pages, that, with redactions based upon personal privacy, were recently disclosed in response to a request under the Freedom of Information Act. While we have made no redactions in the enclosed documents, consistent with 5 U.S.C. § 552a(b)(9), we request that the Committee treat them with appropriate sensitivity.

We hope you find this information helpful. The Office of Management and Budget has advised that there is no objection to submission of this report from the standpoint of the Administration's program. Please do not hesitate to contact this office if you require further assistance with this, or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Lamar Smith

Note: Due to its volume, the document production is not printed in the hearing record but is on file with the House Committee on the Judiciary

ANSWERS TO POST-HEARING QUESTIONS PROVIDED BY THE U.S. DEPARTMENT OF JUSTICE, DATED JULY 16, 2008

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 16, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions for the record posed to Attorney General Michael B. Mukasey following his appearance before the Committee on February 7, 2008. The hearing concerned Department of Justice Oversight. This submission provides responses to a large number of questions posed by the Committee. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to the submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Lamar Smith
Ranking Minority Member

Questions for the Record Posed to
U.S. Attorney General Michael B. Mukasey
House Committee on the Judiciary
DOJ Oversight Hearing on February 7, 2008

QUESTIONS FROM CHAIRMAN CONYERS

Conyers 2 Do you support the President's proposal to cut the budget of the Office of Violence Against Women by $120 million which may require closure of many shelters and rape crisis centers? If so, why?

ANSWER: The Department agrees that the Office on Violence Against Women (OVW) funds many critically important services for victims of domestic violence, dating violence, sexual assault and stalking. Therefore, the decision to request $280 million for OVW was a difficult one. Nevertheless, the Department does believe that consolidating multiple grant programs and introducing competition will help ensure that assistance flows to the local service providers who are most in need of help.

Conyers 18 On December 19, 2007, the Crime Subcommittee held a hearing about the awful case of Jamie Leigh Jones – who reports that she was raped by coworkers in the Iraq green zone and who has struggled for years to bring attention, and prosecution resources, to her case and many other cases like it. The Subcommittee was very disappointed that the Department did not send a witness to this hearing despite our invitation or respond fully to the December 11, 2007, letter from Chairman Conyers and Representative Poe on the issue. How would you respond to the suggestion that this indicates that the Department places a low priority on the issue?

ANSWER: The Department of Justice responded to the December 11th letter from Chairman Conyers and Representative Poe on December 18, 2007, and informed them of the on-going investigation being conducted in the Jamie Leigh Jones matter. As you know, because of legal and ethical considerations, we cannot discuss the status of any matter which may be pending in a United States Attorney's Office, other than facts on the public record. Ms. Jones has made public that she believes she was a victim of sexual assault in Baghdad, Iraq, while she was a civilian contractor. She has also been made aware that her case is being thoroughly investigated. Generally, cases which involve international investigations and the potential for evidence generated in a war-time theater can be complex in nature. Such complex cases usually require time and patience on the part of all interested parties.

After investigating, the Department of State referred a criminal matter involving the alleged sexual assault of Ms. Jones in Baghdad to a United States Attorney's Office, which opened a criminal matter in June of 2007. This particular United States Attorney's Office continues to vigorously and meticulously collect and review evidence in this matter. Among

many other investigative efforts, two Assistant United States Attorneys from that office extensively interviewed Ms. Jones in-person while she was accompanied by her civil lawyer in October of 2007. Further, the United States Attorney's Office believes it has proper jurisdiction to proceed with prosecution should the on-going investigation lead to an indictment. Please be assured that all United States Attorneys' Offices take all allegations of criminal conduct very seriously. This matter is being handled appropriately.

Conyers 19 Would you be willing to provide a witness for a future hearing? If not, why not?

ANSWER: Again, because of legal and ethical considerations, we cannot discuss the status of any matter which may be pending in a United States Attorney's Office, other than facts on the public record. These legal and ethical policies exist for many reasons, including protection of the integrity of an investigation, the safeguarding of a target's constitutional rights, and ensuring the privacy interests of alleged victims. In many alleged sexual assault cases, there are delicate evidentiary issues which could be harmful to relevant individuals if they were inappropriately offered for discussion outside of the confines of a courtroom, which is strictly governed by rules of procedure and evidence.

Conyers 20 Please answer the question from that letter as to: how many MEJA cases have been referred to the Department; how many remain open; and how many involved sexual assault?

ANSWER: Your letter requested written information on the number of cases that have been referred to the Department by other government agencies for potential prosecution under MEJA, how many of those cases are still pending, and how many of those cases involved allegations of sexual assault. As we explained in a May 29, 2008, letter from Principal Deputy Assistant Attorney General Keith B. Nelson, we do not generally release the number of potential criminal cases referred to us by other government agencies, or the number of cases that are presently under investigation. However, of the MEJA cases referred to the Department, fifteen have resulted in the filing of a federal indictment, information, or complaint and another has resulted in a conviction in state court. Of the fifteen cases that have been charged in federal court, nine have resulted in conviction, including two abusive sexual contact cases and three child pornography cases. The remaining six await trial and include one rape and murder case and two child pornography cases. In addition, a number of the referred cases are under active investigation, including seven involving allegations of sexual assault in Iraq.

Conyers 21 On January 23, 2008, Chairman Conyers, Chairman Scott, and Representative Ted Poe wrote to you and the Department of Defense seeking further information on the Departments' indications that they would put in better procedures for this sort of case and asking for a briefing and some data on these types of cases. You have not responded to this letter. When will you respond to the letter?

ANSWER: The Department worked directly with Chairman Conyers' staff to schedule this briefing. The briefing occurred on March 20, 2008, at 2 p.m. in the Rayburn House Office Building.

Conyers 22 What steps have you taken to ensure that overseas contractor cases, including alleged sexual assaults, do not fall through the cracks? Please explain.

ANSWER: The Department is committed to prosecuting criminal acts committed by security contractors overseas, including sexual assaults. To that end, we continue to work with the Departments of Defense and State to ensure there are clear procedures for those Departments, where appropriate, to refer for prosecution allegations of criminal misconduct involving contractors overseas. We are also working with Congress to explore legislative amendments that would increase the Department's ability to hold U.S. contractors overseas accountable under federal law.

Conyers 42 Do you believe that the federal hate crimes statute applies to juveniles? If not, why not?

ANSWER: Yes. The Federal Juvenile Delinquency Act, 18 U.S.C. § 5032, et seq., sets forth the parameters for the analysis of any federal crime, including a hate crime, committed by a juvenile. A juvenile, for purposes of federal prosecution, is a person who had not yet turned 18 at the time of the offense and who had not yet turned 21 by the time of prosecution. If a juvenile commits an act that would constitute a hate crime if committed by an adult, the federal government, subject to 18 U.S.C. § 5032, can proceed against that juvenile and seek a non-criminal adjudication of delinquency.

Conyers 43 As to the Community Relations Division, what recent advances, if any, have been made?

ANSWER: The Community Relations Service (CRS) continues to address community conflicts regarding race, color, and national origin. Among recent cases of national import, CRS has addressed racial tension arising from displays of nooses. In February 2008, CRS announced the formation of a Noose Incident Response Team (NIRT). Following the noose incident in Jena, Louisiana, in 2006, a series of noose discoveries occurred elsewhere in the country. Upon instruction by the Director of CRS, Ondray Harris, CRS established the NIRT to more closely monitor and respond to community racial tensions arising from alleged and real noose incidents.

The NIRT includes CRS staff from each of its ten regional offices throughout the United States. All of the agency's conciliators monitor their respective regions for noose-related cases in order to provide effective and timely conciliation services. The NIRT allows CRS to deploy a rapid response team during extraordinary situations that require immediate attention. Moreover, the NIRT advances CRS' capabilities to attend to cases in the most professional manner possible, holding confidential all communications between community leaders and the agency. Through

the cooperation and effort of various parties. CRS and other authorities can quickly and efficiently address and help to resolve any subsequent tensions that arise from the discovery or depiction of a noose in a community.

In assessing noose-related cases, CRS offers a variety of its conciliation and mediation services. These include:

- Bias and hate crime community forums for law enforcement, prosecutors, and members of the affected community, improving collaboration and effective responses to community tension.
- Contingency planning in advance of marches and rallies, volunteer marshal training, and on-site monitoring to help prevent and defuse tense situations.
- Hate crime training for federal, state, and local law enforcement.

Conyers 44 A February 4, 2008, New York Times article detailed the mismanagement within the Office of the Pardon Attorney, citing a backlog of pardon requests. The article also recounted the abrupt resignation of the pardon attorney, Roger Adams, whose "departure came on the heels of a seven-month investigation of alleged mismanagement by the Justice Department's inspector general." What steps are you taking, or do you plan to take, to rectify the problems in the Office of the Pardon Attorney?

ANSWER: An outstanding candidate, Ronald L. Rodgers, has been selected for the position of Pardon Attorney. Mr. Rodgers began his new assignment on April 28, 2008. The Department fully expects the new Pardon Attorney will run a top flight office which will be positive for the future of the office. For more background on Mr. Rodgers, see the response to Question 45.

As to the backlog, the Department receives over 1,000 new clemency petitions each year. For Fiscal Year 2007, the Department received 1,259 petitions. To give a historical perspective, this Administration has already received more clemency petitions than any other administration in the 20th century except for President Franklin D. Roosevelt's. The processing and evaluation of these cases takes significant time, and in many cases, several years. Under both the previous Administration and the current Administration, the Department has seen sharp increases in the number of clemency petitions received. Unlike prior administrations, however, the overwhelming number of petitions received in the last two administrations have been petitions for commutations of sentence. With the advent of guideline sentencing and the elimination of parole, commutations can be the only way for many prisoners to be released early; however, a commutation of sentence remains an extraordinary form of relief that is rarely granted.

Conyers 45 When do you intend to appoint a permanent successor to Roger Adams?

ANSWER: An outstanding candidate, Ronald L. Rodgers, has been selected for the position of Pardon Attorney, and he began work on April 28, 2008. Mr. Rodgers began his Justice Department career in 1999 after retiring from the United States Marine Corps. In the Marines,

he served as a Judge Advocate in various capacities including stints both as a prosecutor and as a defense counsel for military personnel, and as a military judge. Since joining the Department, he has been assigned to the Narcotics and Dangerous Drug Section within the Criminal Division. He began his service as a trial attorney in the Drug Intelligence Unit (DIU) and was then promoted to Deputy Director and then Director of the DIU. The Department is confident he will do an excellent job leading the Office of the Pardon Attorney.

Conyers 46 As you know, the chief federal judge in Boston, Mark Wolf, recently sent you a letter urging you to discipline Department prosecutors who commit misconduct, and to force them to be truthful in court. His letter was motivated by a concern pertaining to the "Department's mild and secret discipline of Assistant U.S. Attorney Jeffrey Auerhahn in 2006 for misconduct that Wolf said required him to order the 'release from prison of a capo and associate of the Patriarca family of La Cosa Nostra." What have you done in response to Chief Judge Wolf's letter to prevent misconduct from occurring in the future and to discipline prosecutors who had committed misconduct in the past? Please explain.

ANSWER: In the ordinary course of its business, the Department continually seeks to develop strategies for assuring that Department lawyers meet their professional responsibility obligations. This effort arises from, among other things, the Department's commitment to professionalism, the need to assure the integrity of our prosecutions, and the need for the public to have confidence in the legal justice system. Since the events at issue, but not because of them, the Department has taken a number of steps to ensure that our attorneys are aware of their professional responsibility obligations, to provide them with advice on professional responsibility issues, and to take more immediate disciplinary action when such action is appropriate and necessary.

As to awareness of professional responsibility matters, all new attorneys, including Attorney General's Honors graduates, should receive training on their professional obligations within a reasonable period after joining the Department. Paralegals, investigators, and other non-lawyer staff also receive training on how and in what circumstances the professional responsibility rules may affect their conduct. In addition, the Department's Office of Legal Education (OLE) has produced a number of professional responsibility training modules covering many of the most pertinent and important professional responsibility issues for prosecutors. These training modules have been sent out to United States Attorneys' Offices (USAO) for use in training Department employees. Moreover, OLE has created a Video on Demand system that allows USAO attorneys to view different professional responsibility training videos "on demand" while seated at their individual computers. Finally, the Department is currently staffing a proposal to mandate several hours of Department professional responsibility training for Department attorneys, independent from any state bar requirements. All of these initiatives have been proposed to raise the level of awareness of professional responsibility requirements and obligations by Department attorneys.

As to advice and guidance on professional responsibility issues, in 1994, the Department recognized the need for a program dedicated to resolving professional responsibility issues faced by Department attorneys. As a result, on April 14, 1999, the Department officially established

the Professional Responsibility Advisory Office (PRAO) as an independent component within the Department of Justice. The mission of the PRAO is to ensure prompt, consistent advice to Department attorneys with respect to professional responsibility and choice-of-law issues. In addition, each component in the Department has assigned at least one very experienced attorney as a Professional Responsibility Officer (PRO), to whom attorneys may turn for advice and guidance on professional responsibility issues. Department attorneys are encouraged to consult in the first instance with their supervisors and their PROs. Attorneys can also contact the PRAO directly, either before or after receiving advice from their PRO. The PRAO legal advisor obtains a detailed summary of the relevant facts and any relevant case law from the attorney and/or PRO and then provides an opinion to the attorney.

In an effort to ensure greater consistency and fairness in the way in which Assistant United States Attorneys are disciplined as a result of reports of investigations by the Office of Professional Responsibility (OPR), and to ensure the prompt disposition of issues raised by those reports, the Office of the Deputy Attorney General recently issued a memorandum to United States Attorneys. This memorandum set forth strict procedures and time limits for the disciplinary process related to findings of professional misconduct that supplement the mandated due process requirements already established by Title 5, United States Code, Chapter 75.

Conyers 47 On December 6, 2004, the Office of Legal Counsel (OLC) issued an opinion pertaining to the U.S. Commission on Civil Rights that allows the president to appoint as many commissioners to the Commission of the same political party as he chooses, as long as a sufficient number of sitting commissioners switch political party affiliations prior to individual presidential appointments, seemingly undermining the statutory bipartisan requirement codified in 42 U.S.C. § 1975(b). Given your willingness to review OLC opinions, would you consider reviewing and withdrawing this particular opinion? If not, why not?

ANSWER: The December 2004 opinion concludes that, under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. *See* Memorandum Opinion for the Deputy Counsel to the President, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Political Balance Requirement for the Civil Rights Commission* (Dec. 6, 2004) ("OLC Opinion"), *available at* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. After careful review, we have concluded that the OLC Opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history better than an interpretation that would fix party affiliation for purposes of the Commission's composition at the time of appointment. Accordingly, the Department sees no reason to withdraw that opinion.

The Civil Rights Commission has eight members—four appointed by the President, two by the Speaker of the House, and two by the President pro tempore of the Senate. 42 U.S.C. § 1975(b) (2000). The statute provides that "[n]ot more than 4 of the members shall at any one time be of the same political party." *Id.* § 1975(b). By contrast, the provisions of the statute

addressing appointments by congressional leaders specifically link party affiliation to the time of appointment: "not more than one [commissioner] *shall be appointed from* the same political party." *Id.* § 1975(b)(2), (3). The contrast in language is telling:

> "[A]ppointed from the same political party" clearly refers to party affiliation at the time of appointment; "at any one time be of the same political party" clearly is not limited to the time of appointment. Consequently, in appointing a new member, in order to comply with the requirement that "[n]ot more than 4 of the members shall at any one time be of the same political party," the President should look to the party affiliation of the other members at the time the new member is appointed.

OLC Opinion at 2.

Interpreting the statute to fix party affiliation at the time of appointment does not provide better protection against manipulation through insincere changes in party affiliation. If party affiliation were fixed at the time of appointment, a prospective appointee could change his or her affiliation just before appointment to become an Independent, change that affiliation back immediately after appointment, and be counted throughout his or her term as an Independent for purposes of the political balance requirements.

The interpretation set forth in the OLC Opinion better serves interests in political balance in the event of sincere changes in party affiliation. Suppose, for example, that on a Commission composed of four Republicans and four Democrats, one of the Democratic commissioners made a sincere change of affiliation and became a Republican, and one of the other Republican members then resigned. If party affiliation were fixed at the time of appointment, the President would next have to appoint another Republican or an Independent and could not appoint a Democrat, even though the Commission would already have four Republicans and only three Democrats. The OLC Opinion, however, would call for the appointment of a Democrat or Independent, thus better preserving the Commission's balance.

Sincere changes of party affiliation are well known among those in public life. For example, Senators Ben Nighthorse Campbell, James Jeffords, Richard Shelby, and Robert Smith, and Representatives Rodney Alexander, Nathan Deal, Virgil Goode, Phil Gramm, Robert Stump, and Billy Tauzin all changed their party affiliation while serving in Congress. Former Commission member Mary Frances Berry reportedly changed her party affiliation while on the Commission, identifying herself as an Independent beginning in the 1980s. News accounts indicate that one of the sitting Commissioners who changed her registration from Republican to Independent had, before her appointment to the Commission, registered both as a Democrat and as an Independent. Considering commissioners' changes in party affiliation in making new appointments is not only directed by the plain language of the statute but also better promotes interests in preserving the political balance of the Commission. We are not aware of a more persuasive alternative interpretation of section 1975(b).

Of course, Congress retains the authority to amend the terms of the statute if it wishes to make a Commissioner's party affiliation at the time of appointment controlling for purposes of presidential appointments under section 1975(b).

Conyers 49 If you do not believe that EOIR needs additional full-time employees in FY2009, can you please tell us your plan for ensuring that EOIR will not develop a backlog without additional personnel? We believe that such a plan must also ensure that EOIR can provide respondents in removal proceedings with fair, thorough, and timely adjudication, and that potentially dangerous aliens are removed in a timely manner.

ANSWER: Our plan to prevent EOIR from developing a backlog is to continue the hiring programs currently underway and to utilize existing resources efficiently. EOIR will continue to monitor its caseload and will seek additional resources, as appropriate.

In August 2006, the Attorney General issued 22 directives to improve the immigration courts and the Board of Immigration Appeals (BIA). These initiatives include specific measures that will help ensure that cases move through the system as efficiently as possible while ensuring due process. Improvements to the streamlining reforms, implementing and installing a new digital audio recording system in the immigration courts, and improving transcription services should all assist in this regard. Additionally, as directed in one of the initiatives, in December 2006, the Department published an interim rule increasing the size of the BIA to fifteen permanent members. The rule also expanded the pool of persons eligible to serve as temporary board members which has, in part, enabled the BIA to manage its caseload. The BIA will continue to monitor and project future caseloads and adjust resources accordingly, including the number of temporary BIA members.

EOIR staff will also continue to work in conjunction with the Department of Homeland Security regarding the efficient placement of judicial resources. To address growing immigration caseloads in certain areas, EOIR is establishing new immigration courts in Charlotte, North Carolina; Omaha, Nebraska; and Kansas City, Missouri. Subject to the completion of these facilities, EOIR plans to open these new courts sometime in September. The Department is confident that these collective efforts will ensure fair and timely hearings and ensure that resources are allocated to achieve optimal results.

Conyers 50 In August 2006, then-Attorney General Alberto Gonzales announced that DOJ will implement 22 measures to improve the performance of the immigration courts and the Board of Immigration Appeals (BIA). Please give us an update on the progress of each initiative.

ANSWER: The Department has made substantial progress in implementing these initiatives. To date, the majority have been completed, including: (1) requiring all newly appointed immigration judges (IJs) and members of the BIA to pass a written exam prior to adjudicating cases; (2) improving training for new appointees and developing a continuing education program for veteran IJs and members of the BIA; (3) creating a system to evaluate the performance of

newly appointed IJs and members of the BIA; (4) developing a training program to strengthen the ability of BIA staff attorneys to perform their screening and drafting duties; (5) creating a more systematic way for members of the BIA and Office of Immigration Litigation attorneys to report conduct, professionalism, or quality concerns; (6) reviewing and analyzing concerns raised regarding disparities in asylum grant rates; (7) creating the position of Assistant Chief Immigration Judge (ACIJ) for Conduct and Professionalism to monitor and review all allegations of misconduct against IJs; (8) improving transcription services; (9) developing a process for referring complaints about immigration fraud and abuse; (10) assigning ACIJs to six regional offices; (11) revising the IJ Bench Book; (12) publishing a comprehensive immigration court practice manual; (13) pursuing appropriate budget increases; (14) forming a committee to oversee the expansion and improvement of EOIR's Pro Bono programs; and (15) enhancing interpreter services.

Other initiatives are well under way or are near completion, but require additional steps to complete them. These include: (1) implementing a performance appraisal system for IJs and members of the BIA; (2) clarifying the conduct standards that IJs and members of the BIA must abide by; (3) making final improvements to the streamlining reforms; (4) increasing the size of the BIA to fifteen permanent members; (5) expanding the bases upon which discipline may be imposed on attorneys and representatives who appear before immigration courts or the BIA; (6) implementing a new digital audio recording system; and (7) developing a proposed rule for implementing civil penalty sanction authority for IJs.

Conyers 51 DOJ's budget request for EOIR is $261.4 million, $27 million over the enacted FY2008 spending level. This amount includes $10 million from the Southwest Border Enforcement Initiative. Of the $10 million, $8.3 million will be used to install and maintain a Digital Audio Recording (DAR) system for immigration courts nationwide. Immigration Judges currently use audio cassette recorders to tape proceedings in immigration courts. These recorders are often old and/or set at improper settings. In addition to their many responsibilities during the hearings, the Immigration Judges must also ensure that the tape recorder is recording the proceedings correctly. These problems are compounded by the fact that the quality of the recordings sometimes fails to capture overlapping speakers, or speakers with foreign accents. These factors lead to unintelligible written transcripts that cannot be adequately reviewed by the BIA or the federal courts. While the transition from the old tape to a new digital recording system would be an improvement, the DAR system will likely not free up the Immigration Judges to concentrate on their duties as adjudicators. Furthermore, it is unclear whether the DAR system will be able to adequately address the issue of clearly capturing overlapping speakers, or speakers with foreign accents. Can you tell us whether DOJ has considered using court reporters, rather than moving to a DAR system?

ANSWER: The significant problems with EOIR's current tape recording system are well known and the Digital Audio Recording (DAR) system has been expressly designed to address them.

The DAR system will reduce the immigration judge's (IJ) administrative work and will allow IJs to focus on their duties as adjudicators. With the current tape recording system, IJs must be constantly aware of the tape's progress and be ready to replace the tape should the machine fail or the tape run out. The IJ must handwrite significant case information on all tapes so they will not be mistakenly placed with the wrong case. Furthermore, extended cases can involve more than a dozen tapes. Should an IJ wish to replay a particular portion of the hearing, that portion must be found somewhere among the multitude of tapes, and the IJ must ensure that no tapes are lost in all the sorting, reorganizing and movement.

DAR was designed with the IJ's workload in mind. DAR is integrated with EOIR's electronic case management system, CASE. Data entry for the IJ is non-existent because all needed information is automatically downloaded from CASE. An IJ need only click on a case to begin a recording for it. That recording can run all day so there is no need to be concerned that the tape will run out. Visual cues on the workstation allow IJs to monitor and control all aspects of system performance at a single glance. There are no tapes to keep track of or sort through when an IJ wishes to replay a segment of a hearing—all recordings are available through CASE. When multiple respondents are heard simultaneously, the system will automatically link the recording to each respondent's alien number (A-Number), eliminating time-consuming tape duplication.

The DAR system uses focused microphones, true channel separation, sophisticated high fidelity audio mixing equipment, and courtroom-specific tuning to improve the quality of the sound collected. These elements have shown considerable improvement over the old analog tape recorders in the recording and playback of multiple speakers and speakers with foreign accents.

Court reporters were considered, but issues of cost and manageability render them impractical. EOIR has more than 200 IJs conducting hearings each day. A full staff of court reporters to ensure complete coverage of all hearings would be cost prohibitive. To contract out such a large number of positions would be equally cost prohibitive. Therefore, the cost implications of either plan would be significant to EOIR and were deemed to be impractical.

Conyers 52 If you did consider this option and decided against it, please explain why DOJ chose the DAR system over court reporters.

ANSWER: Please see the response to Question 51.

Conyers 53 Also, please explain how the DAR will improve the problem with clearly capturing overlapping speakers and/or speakers with foreign accents.

ANSWER: The Digital Audio Recording (DAR) system uses focused microphones, true channel separation, sophisticated high fidelity audio mixing equipment, and courtroom-specific tuning to improve the quality of the sound collected. These elements have shown considerable improvement over the old analog tape recorders in the recording and playback of multiple speakers and speakers with foreign accents.

Each of the seven high fidelity microphones (replacing three to four microphones of mixed quality with the tape system) is directional and, therefore, focused on a single speaker. This focus allows an individual listening to the recording to turn off speakers other than the one in which he or she is interested. The DAR system also allows the listener to slow down playback without affecting the tone and to turn off or reduce the volume of any of the other channels so that individual speakers can be heard loudly and clearly.

Many of the same features make it easier to hear speakers with foreign accents. Additionally, the system features "automatic gain control" to automatically increase or reduce, within limits, the recorded volume of speakers who may be too quiet or loud to be heard clearly.

Conyers 54 The Committee has recently been made aware of unreasonable delays at the Board of Immigration Appeals (BIA) with respect to cases remanded by the Circuit Court of Appeals. We have been informed of numerous cases, including cases involving detained respondents, where the BIA has taken from six months to over one year to take action after a remand. These delays appear to occur even in cases where the only BIA action required is a further remand of proceedings to an immigration judge. What process does DOJ (including the BIA, the Office of Immigration Litigation, and the Solicitor General) employ following a remand to the BIA from the Circuit Court of Appeals?

ANSWER: During the past fiscal year the Department has made continuing progress in ensuring that cases remanded by the circuit courts to the BIA are processed in a timely fashion. With respect to the process itself, the litigators at the circuit court level, usually the Office of Immigration Litigation (OIL), will provide EOIR notice of the remand and the reason for the remand, which may be reflected in the court's decision, a motion to remand that was filed with the circuit court, or a stipulation. This notice is provided to EOIR's Office of the General Counsel (OGC). OGC confirms that the reason for the remand is included with the notice in order to ensure the BIA is provided the information necessary to adjudicate the remand. The remand is then forwarded to the BIA.

Following the issuance of an adverse decision from a court of appeals, the Department of Justice consults with the Department of Homeland Security about whether further review is warranted. Formal recommendations may be submitted to the Solicitor General regarding whether further review should be sought. The Department's process for deciding to seek further review is very careful and deliberative.

Upon notification of a circuit court remand, and the issuance of a circuit court mandate, the BIA requests the record of proceedings from the immigration court with initial jurisdiction over the case. However, it is important to note that the mandate only issues after the time for seeking further review has expired. In most instances, the immigration court must in turn request the file from the local Federal Records Center to which the file has been retired. The BIA also updates the electronic database regarding the matter to reflect that a circuit court remand is now pending. The BIA must also await the final decision from the litigators on whether or not they will seek further review of the court's decision and issuance of the mandate from the circuit

court. In a few cases, this may be quite time consuming. When EOIR receives notice that the mandate has issued (because no further review has been sought or further review is completed), the remand is processed promptly, with priority being accorded cases involving detained aliens.

To further address concerns regarding delays in this process, OIL and EOIR have improved communications regarding all stages of federal litigation of immigration cases in the past fiscal year, which has significantly improved all aspects of administrative immigration litigation management.

Conyers 55 Considering that the United States has a maximum of 90 days to seek rehearing or file a petition for certiorari with the Supreme Court, why should the BIA take any longer than four months to file a briefing schedule or remand the case for further proceedings to an immigration judge?

ANSWER: Please see the response to Question 54. The Board of Immigration Appeals (BIA) cannot proceed with adjudication of circuit court remands until the judicial proceedings are completed by the litigators. Deliberations regarding whether to seek further review in federal court can cause delay of the BIA's adjudication of remands. The process for seeking further review can also contribute to the delay. The time period to file petitions for rehearing or rehearing en banc before the circuit courts, or for certiorari before the United States Supreme Court, may be extended, and requests for extension are almost always granted when first requested. In addition, no petition for certiorari can be made until after a petition for rehearing en banc has been denied by the circuit court, a process that will take many months, even if the petition for certiorari is ultimately denied.

Conyers 56 What is being done to ensure that the BIA moves on remanded cases—especially when the respondent is detained—as quickly as possible?

ANSWER: See response to Question 54. Detained cases are given the highest priority at EOIR, and all efforts are made to complete detained cases expeditiously. The timely handling of these cases protects the interests of both the respondent and the government. By regulation, the Board of Immigration Appeals (BIA) is required to adjudicate certain cases within certain time frames and to give detained cases priority. The Department will continue to ensure the BIA's success in meeting these time frames and for handling detained cases as a priority.

Conyers 60 What are the most common reasons for these "hits"?

ANSWER: When the FBI searches a person's name, the name is electronically checked against the FBI's Universal Index. These searches seek all instances of the individual's name, Social Security number, and dates close to the individual's date of birth, whether these instances may be the subjects of main files or references contained in other files ("references" include, for example, associates, witnesses, conspirators, or others included in the FBI's index for later recovery).

The names are searched in many combinations, such as switching the order of first, last, and middle names and combining only the first and last names, first and middle names, and so on. Names are also searched phonetically so that spelling variations are retrieved (which is especially important for names that have been transliterated from a language other than English).

If there is a match with a name in an FBI record, it is designated as a "hit," meaning the system has stopped on a possible match with the name being checked. If a search reveals a match to a name with a close date of birth or Social Security number, it is designated an "Ident."

Conyers 61 What steps is DOJ taking to reduce the backlog of FBI name checks?

ANSWER: We are taking numerous steps to reduce the number of pending USCIS name checks, including the following:

- The FBI has hired contractors to augment the FBI staff processing USCIS requests. Currently 250 contractors jointly funded by the FBI and USCIS are onboard and dedicated to processing USCIS name checks, with approximately 40 additional contractors scheduled to begin work by the summer of 2008.

- The FBI raised fees in order to properly resource the program. Before this increase, the fees charged to process name checks had not been adjusted since the early 1990s and did not cover the basic costs of providing the service. A fee study determined an appropriate fee to offset the cost, and the FBI has implemented an interim fee while the final fee structure is undergoing the "Notice of Proposed Rulemaking" process.

- The FBI has revamped the name check process, moving the "File Review" phase of the process (when paper files are located and scanned) from the middle of the process to the end. Because the files associated with many USCIS name checks are electronically available and do not require the retrieval of paper files, this restructuring significantly streamlines the path followed by many USCIS name checks.

- When paper files must be reviewed, the FBI is scanning these files, creating an electronic database to which analysts have remote electronic access.

- The FBI has developed an Operational Business Plan that takes maximum advantage of the additional revenue from the revised fees and funding appropriated in FY 2008 to incorporate revised business processes these funds make possible.

- Revised processes also leverage the advantages realized by embedding USCIS employees with FBI personnel to enhance coordination.

- The FBI has begun using a forecasting model to project resource and personnel usage. This dynamic tool takes into consideration aging name checks and allows for more accurate operational predictions based on adjustments to the process.

- Through contracts, the FBI has procured additional expertise in the areas of Business Statistics, Financial Management, Information Technology, and Production/Throughput. The addition of these skill sets will greatly enhance the FBI's ability to analyze data and reports, to develop and update business forecast models quickly, to plan and develop the financial aspects of the Name Check Program, to increase the emphasis on business automation and the use of new IT systems, and to focus on evaluating and implementing means of increasing throughput.

- The FBI is developing a Central Records Complex (CRC) to serve as a central records repository. Although currently paper files must be retrieved from over 265 FBI locations worldwide, creation of the CRC will permit expedited access to the information contained in billions of pages of documents.

Conyers 62 What steps is DOJ taking to digitize the files it uses to conduct name checks?

ANSWER: As indicated in the response to Question 61, when paper files must be reviewed, the FBI is scanning these files, creating an electronic database to which analysts have remote electronic access.

Conyers 63 What steps is DOJ taking to permit electronic name check searches?

ANSWER: Please see the response to Question 62.

Conyers 64 What is the timeline for completion of digitization and electronic search capability?

ANSWER: As indicated in the response to Question 61, the FBI is currently scanning the paper files reviewed in the process of name checks. Because many paper files may never be requested, it would not be an efficient use of resources to digitize all 178 miles of existing paper files. Instead, the FBI is digitizing existing files when retrieval is requested. Even without complete digitization, though, the name check process will be more rapid when the CRC is established, because the CRC will afford quick and efficient access to all FBI records and allow for the immediate scanning of documents that must be digitized on an as-needed basis.

Conyers 65 In terms of man hours and cost, what resources is DOJ devoting to defending law suits relating to FBI name check delays?

ANSWER: The FBI's Office of the General Counsel (OGC) currently devotes the following resources to cases associated with FBI name checks.

- Three full-time paralegals and one full-time attorney spend 100% of their time on name check matters.
- Three part-time attorneys and nine full-time attorneys spend approximately 60% to 70% of their time on name check matters.
- Two full-time paralegals spend approximately 30% of their time on name check matters.
- A part-time attorney spends approximately 20% of his time on name check matters.
- Thirteen full-time attorneys, one full-time paralegal, and one part-time paralegal spend approximately 10% of their time on name check matters.
- Numerous additional OGC attorneys and paralegals assist with name check matters in varying amounts of time depending on the need at any given time.

In addition, the District Court Section of the Office of Immigration Litigation, Civil Division, currently devotes the following resources to defending cases associated with FBI name checks:

- One full-time Senior Litigation Counsel and four full-time Trial Attorneys devote 65-75% of their time; five full-time Trial Attorneys devote 25-40% of their time; three full-time Senior Litigation Counsel and ten full-time Trial Attorneys devote 5-10% of their time.
- One full-time paralegal devotes 50% of her time; one full-time contract paralegal devotes 35% of her time; and two additional full-time contract paralegal/legal assistants devote 10% of their time.

Conyers 66 You have yet to respond to the letter that Chairwoman Lofgren and I sent you on January 28 concerning the Board of Immigration Appeals decision in Matter of A-T-, 24 I. & N. Dec. 296 (BIA 2007). That decision will have devastating consequences for women who have suffered or are facing female genital mutilation, forced marriage, and other human rights abuses. Please respond to the concerns raised in that letter and let us know how the DOJ intends to address the BIA's unsupported and ill-advised reversal in U.S. policy with respect to the fundamental human rights of women. I have included the letter for your reference.

ANSWER: The Department provided a response to your letter along with an identical response to Chairwoman Lofgren on February 7, 2008.

The Attorney General shares your concerns about female genital mutilation (FGM). There can be no question that FGM is an offensive practice that can cause severe physical and psychological harm to girls and women. Indeed, in a published opinion of the Board decided after *Matter of A-T-*, two applicants subjected to FGM were granted asylum on humanitarian grounds, and thus had no need to demonstrate a well founded fear of future persecution. *See Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008). In addition, although the Board held in Matter of A-T- that past FGM alone does not support "continuing persecution," it remains open to asylum applicants to argue that past FGM, in conjunction with other evidence concerning possible future treatment, establishes a well founded fear of future persecution.

We are currently reviewing the Board's decision in *Matter of A-T-*, including whether it is consistent with the statute and regulations, as well as with prior Board decisions. We also note that these issues have and will continue to be addressed by the courts. Since the BIA's decision, a petition for review has been filed and is pending in the U.S. Court of Appeals for the Fourth Circuit. Moreover, the U.S. Court of Appeals for the Second Circuit recently issued a published decision criticizing the reasoning of *Matter of A-T-*, and it remanded the case to the Board for further consideration of the issues relating to future persecution. *See Bah v. Mukasey*, No. 07-1715-ag, 2008 WL 2357411 (2d Cir. June 11, 2008).

Conyers 67 Nick Bailey, a former aide to Governor Don Siegelman, was the government's primary witness in the prosecution of Governor Siegelman. In a "60 Minutes" piece that aired on February 24, 2008, Mr. Bailey indicated that before the Siegelman trial, he spoke to prosecutors more than seventy (70) times, and he admitted that during those conversations he had trouble remembering details. He also told "60 Minutes" that the prosecutors were so frustrated that they made him write his proposed testimony repeatedly under he got his story straight. How many times did Department prosecutors speak to Nick Bailey about the Siegelman case?

ANSWER: We do not know whether Mr. Bailey actually made the statements that "60 Minutes" has ascribed to him. As with any other cooperating witness, government agents and prosecutors met with Mr. Bailey as necessary and appropriate during the investigation to obtain his knowledge of relevant facts.

Conyers 68 Why was it necessary to speak to Mr. Bailey so many times? Please explain.

ANSWER: As stated above, government agents and prosecutors met with Mr. Bailey as necessary and appropriate during the investigation to obtain his knowledge of relevant facts.

Conyers 69 Is that ordinary practice? Please explain.

ANSWER: Yes.

Conyers 70 Did Department prosecutors in the Siegelman case require Mr. Bailey to "get his story straight" by writing his proposed testimony over and over? Please explain.

ANSWER: No. As Mr. Bailey expressly and repeatedly testified under oath at trial, he was not "scripted" or "rehearsed."

Conyers 71 Did Department prosecutors turn over Mr. Bailey's notes to Governor Siegelman's attorneys? If not, why not?

ANSWER: Department prosecutors provided complete and proper discovery of every statement by Mr. Bailey. If Mr. Bailey made notes of some kind, they were not given to the government, and they would, therefore, not have been discoverable from the government.

Conyers 72 If Department prosecutors did not turn over Mr. Bailey's notes, should they have in accordance with the law? If not, why not?

ANSWER: Please see the response to Question 71.

Conyers 78 What plans are being made by the Department to prepare for the upcoming 2008 presidential election to prevent voting rights violations, specifically vote suppression?

ANSWER: The Department of Justice plays a limited, but important, role with respect to elections. A major component of the Department's work to protect voting rights is the Civil Rights Division, Voting Section, election monitoring program, which is among the most effective means of ensuring that federal voting rights are protected and respected on Election Day. The Department deploys hundreds of personnel to monitor elections across the country. In 2006, a record number, for a mid-term election, of Department monitors and federal observers from the Office of Personnel Management were deployed to jurisdictions across the country. In total, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states during the November 7, 2006, election. In calendar year 2006, we sent over 1,500 federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

During calendar year 2004, a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 states. This compares to the 640 federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year.

For the 2008 elections, the Department will implement a comprehensive Election Day program to help ensure ballot access and to combat voter suppression. As in previous years, the Department will coordinate the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

As in prior years, in 2008, the Department will monitor States' compliance with the requirements of the Voting Rights Act, the Help America Vote Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the National Voter Registration Act, instituting enforcement actions as necessary. In that regard, we will closely monitor compliance with our numerous court orders, consent decrees, and other agreements, many of which will be in effect through the 2008 election cycle. The Department's efforts to ensure voter access in accordance with federal law will include training a responsible official, the District Election Official (DEO), in every U.S. Attorney's Office across the country on ballot access laws to stand ready to protect the voting rights of all Americans.

Such extensive efforts require substantial planning and resources. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are most needed. To that end, Department officials will meet with representatives of a number of civil rights organizations prior to the 2008 general election, including organizations that advocate on behalf of racial and language minorities, as well as groups that focus on disability rights. Department officials also will meet with representatives of state and local election officials before the 2008 general election. These meetings will provide a forum for discussion of state and local officials' concerns.

On Election Day, Department personnel here in Washington will stand ready. We will have numerous phone lines ready to handle calls from citizens with election complaints, as well as an internet-based mechanism for reporting problems. We will have personnel at the call center who are fluent in Spanish and the Division's language interpretation service to provide translators in other languages.

Conyers 79 In a recent vote suppression hearing, the Judiciary Committee received statements from many organizations including the National Association for the Advancement of Colored People (NAACP), Mexican American Legal Defense and Education Fund (MALDEF), American Civil Liberties Union (ACLU), Asian American Legal Defense and Education Fund, Asian American Justice Center (AAJC), DEMOS, Project Vote, Campaign Legal Center indicating voter suppression is a major problem in the communities they represent. While the Department has been placed significant focus on voter fraud, it appears that the Voting Section of the Civil Rights Division has neglected its duty to fully enforce Section 2 of the Voting Rights Act, a provision largely aimed at combating racial discrimination in the voting process. What level of resources do you intend to devote to voter suppression cases as compared to voter fraud prosecutions?

ANSWER: The Department shares your concerns about any action – whether intentional, deceptive, accidental, or simply misguided – that is potentially misleading and threatening to voters. The Department has successfully devoted, and continues to devote, considerable resources to enforce protections against voter intimidation and suppression. Indeed, during the period between the 2004 and 2006 general elections, the Department filed far more actions to protect voters against discrimination at the polls than in any two-year period in its history. Since 2002, successful lawsuits to enforce protections against voter intimidation and suppression have included key cases to (1) protect the rights of minority voters against race-based challenges to

the eligibility of minority voters; (2) ensure appropriate treatment of minority voters; (3) prevent improperly influencing, coercing, or ignoring the ballot choices of minority voters; (4) ensure that voters, including minority voters, are provided with provisional ballots; (5) ensure that voters, including minority voters, are provided the assistance in voting that they are legally entitled to receive; (6) ensure that minority language voters are provided the bilingual assistance in voting that they need and are legally entitled to receive; and (7) ensure that localities provide voters, including minority voters, with the information Congress determined necessary in all polling places, including the posting of information on voters' rights.[1] These cases include approximately 60 percent of all cases the Department has filed in its entire history under the language minority provisions of the Voting Rights Act and approximately 75 percent of all cases the Department has filed under the voter assistance provisions of the Act.

In addition, since 2002, the Department has taken an increasingly proactive approach to potential Election Day problems and issues. Rather than wait for complaints, the Department has attempted to identify locations where problems were likely to occur, to pre-position personnel both to document and address such issues as arise on Election Day, and to deter some potential problems. As a result of this extensive pre-election investigation and outreach, on Election Day 2006, the Department assigned more than 800 federal observers and Department monitors – a record number for a mid-term election – to selected polling places in 69 jurisdictions in 22 states across the country. Records were also set for Election Day federal observers and Department monitors in 2002 and 2004.

The Department will continue its vigorous enforcement of federal civil rights laws. This enforcement, particularly under sections 2, 4(f)(4), 203, and 208 of the Voting Rights Act, protects voters who are subject to discrimination on the basis of race or membership in a language minority group. The Department also will continue its unprecedented and vigorous outreach to community and advocacy organizations, as well as other groups representing language and other minority citizens. In addition, the Department will continue its vigorous outreach to state and local election officials to advise them of the requirements of federal law and urge their voluntary compliance. Finally, the Department will continue its robust program of monitoring elections to protect the rights of all citizens.

The Constitution vests in states the primary responsibility for the method and manner of elections, except where Congress has expressly legislated otherwise. Federal laws provide limited jurisdiction over incidents such as the ones described in your question. Where federal jurisdiction exists, the Department has historically concluded that the responsibility to ensure voter access, on the one hand, should be distinct from the responsibility to police voter fraud, on

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[1] *See, e.g., United States v. Cochise County, Arizona*; *United States v. City of Azusa, California*; *United States v. City of Paramount, California*; *United States v. City of Rosemead, California*; *United States v. San Benito County, California*; *United States v. San Diego County, California*; *United States v. Ventura County, California*; *United States v. Miami-Dade County, Florida*; *United States v. Orange County, Florida*; *United States v. Osceola County, Florida* (2002); *United States v. Osceola County, Florida* (2005); *United States v. Long County, Georgia*; *United States v. City of Boston, Massachusetts*; *United States v. City of Springfield, Massachusetts*; *United States v. Suffolk County, New York*; *United States v. Westchester County, New York*; *United States v. Brentwood Union Free School District, New York*; *United States v. Berks County, Pennsylvania*; *United States v. Brazos County, Texas*; *United States v. Ector County, Texas*; *United States v. Hale County, Texas*; *United States v. N. Harris Montgomery Community College District, Texas*; *United States v. Yakima County, Washington.*

the other. For example, the Criminal Division has a great deal of institutional expertise in prosecuting all types of fraud, including voter fraud, while the Civil Rights Division is best situated to deal with issues of discrimination at the polls.

Conyers 80 Will combating voter suppression be a priority for the Department in the 2008 Presidential election? If not, why?

ANSWER: Yes. Please see the response to Question 79.

Conyers 81 Enforcement of Section 7 of the National Voter Registration Act (Motor Voter) is key to providing greater assess to voting. The Association of Community Organizations for Reform Now (ACORN), Demos, and Project Vote reported that voter registration applications from public assistance agencies nationwide have declined by 59.6% since 1995, while applications from all other sources have increased by 22%." A decline in registration applications from public assistance agencies has occurred in 36 of 41 reporting states since 1995. What efforts is the Department making to ensure that states are complying with Section 7 of the National Voter Registration Act?

ANSWER: The Department enforces all federal election laws enacted by Congress, including all provisions of the NVRA. As part of these efforts, in 2007, the Department sent letters to approximately 18 states regarding their compliance with Section 7. These states were selected through an objective methodology that relied on available data, including, but not limited to, reports from the Election Assistance Commission. The Department continues to monitor the compliance of all covered states with the NVRA and will gather additional information from states and take action as appropriate. Our efforts have, in some instances, resulted in compliance without the need to resort to litigation. For example, the State of Nebraska recently took action to comply with Section 7 as a result of the Department's inquiry. In a letter to the state last year, the Department suggested that Nebraska may have to take steps to comply with Section 7, and on March 10, 2008, Nebraska's Governor signed into law a bill designating additional selected state offices as "voter registration agencies" under Section 7 of the NVRA. In addition, officials from the state of Iowa recently reported that a similar bill introduced in response to the Department's enforcement efforts is currently pending in the Iowa State legislature.

Conyers 82 The U.S. Supreme recently heard arguments in the Crawford v. Marion County Election Board case. The suit challenges Indiana legislation requiring voters to provide photo ID, charging that it creates an unconstitutional burden on voters. Given the Department's history of opposing photo identification requirements for voting when the law does not include a fail safe provision for those without identification, why did the Department choose to file a brief in support of the Indiana law in the Crawford case?

ANSWER: The Department has a strong interest in enforcing federal election laws enacted by Congress, including the provisions of the Help America Vote Act (HAVA), to preserve and protect the voting rights of Americans. The *Crawford* case affects the Department's ability to

enforce the Help America Vote Act, which requires voters to provide proof of identification before registering or casting their first ballot.

Congress has enacted numerous requirements, including registration and identification requirements, designed to "increase the number of eligible citizens who register to vote" while simultaneously "protect[ing] the integrity of the electoral process." 42 U.S.C. 1973gg(b)(1), (3). Congress enacted the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (42 U.S.C. 15301 *et seq.*), to establish and modernize various minimum election administration standards for federal elections. Among other things, HAVA requires voters to provide proof of identification before registering or casting their first ballot, see 42 U.S.C. 15483(a)(5)(A), (b)(2)(A), (3)(A). The Attorney General is responsible for enforcing those provisions, 42 U.S.C. 1973gg-9, 15511, and *amicus* briefs filed by certain Senators and Members of Congress specifically put the proper interpretation of HAVA and its effect on state laws before the Supreme Court in *Crawford*.

The lead opinion in *Crawford*, written by Justice Stevens, discussed HAVA as well as another federal statute that the Civil Rights Division enforces, the National Voter Registration Act of 1993 (NVRA). It found that "[b]oth [HAVA and the NVRA] contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote." *Crawford v. Marion County Election Bd.*, Nos. 07-21 and 07-25, 2008 WL 1848103, at *7 (U.S. Apr. 28, 2008).

The Attorney General also has authority to prosecute voter fraud in federal elections. *See, e.g.*, 42 U.S.C. 1973i(c), (e), 1973gg-10. Voter fraud itself dilutes the right to vote. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006). Legitimate efforts to detect or deter voter fraud therefore promote the right to vote and protect the integrity of the process. As stated in Justice Stevens' lead opinion in *Crawford*, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." 2008 WL 1848103, at *9 (quoting Commission on Federal Election Reform, Report, Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136-137).

In the *Crawford* case, the U.S. Supreme Court rejected a facial constitutional challenge to the Indiana photo identification law. Justice Stevens' lead opinion determined that Indiana's interests in furthering election modernization, preventing voter fraud, and safeguarding voter confidence justified the burdens imposed on the right to vote. As stated in that opinion: "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Id.* at *8. The concurring opinion stated: "The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation[.]" *Id.* at *13 (Scalia, J., concurring). "The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State's interests are sufficient to sustain that minimal burden." *Id.* at *15 (internal citations and quotation marks omitted).

QUESTIONS FROM CONGRESSMAN SCOTT

Scott 83 The Inspector General released a report in December 2007 that details the results of a seven-month investigation of the Office of the Pardon Attorney and lays out allegations of racism, intimidation, and mismanagement. What is the Department's official position on the findings of the Inspector General; in particular, the alleged misconduct of former Pardon Attorney Chief, Roger Adams? In addition, since part of the Office of the Pardon Attorney's task is to deal with pardon petitions in a timely manner, why is there such a significant backlog of cases that has led to waits of two, three, four, and as long as seven years before decisions are reached on petitions? What does the Department plan to do to resolve this problem?

ANSWER: The Inspector General has conducted an investigation and made findings. While we cannot discuss the specifics of any case involving discipline, we can say where the Inspector General finds misconduct, the Department's protocol for imposing discipline tracks the process established by merit systems regulations. The protocol requires issuance of proposed discipline. The employee can either accept the discipline, or respond to the proposal. A higher level manager then will issue a decision on the proposal. If the imposed discipline involves a suspension of more than fourteen days or removal, then the employee can request a trial de novo by a Merit Systems Protection Board (MSPB) judge. The MSPB judge has the option to affirm the punishment, reduce the punishment, or exonerate the individual.

Mr. Adams was detailed to another Department component, but has since resigned from government service. As to the backlog request, please see the response to Question 44.

Scott 85 The Crime Sub-Committee was very disappointed that the Department of Justice did not send a witness to a hearing on Protecting Overseas Contractors, such as rape victim Jamie Leigh Jones, despite an invitation, since the Department is responsible for investigating and prosecuting MEJA cases, such as those involving sexual assault. How many MEJA cases have been referred to the Department and how many involve sexual assault? What steps has the Department taken to ensure that overseas contractor cases, like the sexual assault on Jamie Leigh Jones, are being thoroughly investigated and receiving due consideration for prosecution?

ANSWER: As explained in the response to Question 20, we do not generally release the number of potential criminal cases referred to us by other government agencies, or the number of cases that are presently under investigation. However, of the MEJA cases referred to the Department, fifteen have resulted in the filing of a federal indictment, information, or complaint and another has resulted in a conviction in state court. Of the fifteen cases that have been charged in federal court, nine have resulted in conviction, including two abusive sexual contact cases and three child pornography cases. The remaining six await trial and include one rape and murder case and two child pornography cases. In addition, a number of the referred cases are under active investigation, including seven involving allegations of sexual assault in Iraq.

The Department is committed to prosecuting criminal acts committed by security contractors overseas, including sexual assaults. To that end, we continue to work with the Departments of Defense and State to ensure that there are clear procedures for those Departments, where appropriate, to refer for prosecution allegations of criminal misconduct involving contractors overseas. We are also working with Congress to explore legislative amendments that would increase the Department's ability to hold U.S. contractors overseas accountable under federal law.

Scott 87 At the February 7, 2008 hearing before the House Judiciary Committee, you indicated that you would provide the information supporting your contention that most of the people who may be released early as a result of the Sentencing Commission's decision to apply its crack cocaine sentencing guideline adjustments retroactively are violent offenders. Please identify the cases you are referring to and what causes you to conclude they are violent offenders that pose a threat of violence to the public if released earlier than they are now scheduled for release. Will these offenders also pose the same threat if they are released as currently scheduled, and if not, why not, and if so, what plans has the Department made to protect the public at that time that cannot now be implemented?

ANSWER: Many of the offenders eligible for release received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense. This is characteristic of crack offenders, as there is far greater violence at the local level associated with the distribution of crack as compared to powder. For example, according to Commission studies, in 2005, crack cocaine offenders had access to, had possession of, or used a weapon in 32.4 percent of cases in 2005, as opposed to powder cocaine offenders who had access to, had possession of, or used a weapon in 15.7 percent of cases.

One of the factors that makes early release particularly dangerous is that many of the prisoners will be unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Your sponsorship of the Second Chance Act, which the President was proud to sign into law earlier this spring, suggests that you recognize the value of these programs. In any event, preparation to re-enter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a Social Security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences. With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates' participation in the Bureau's re-entry programs. Without that, the offender's chance of re-offending will likely increase.

Scott 88 It is not uncommon for articles to appear in newspapers that suggest that serious violations of civil rights have occurred. If a member of a Congressional Committee or Subcommittee with oversight authority over the Department of Justice (DOJ) views the

allegations as serious and brings such an article to the attention of DOJ requesting a review of the situation, can we rely on DOJ to assess the situation sufficiently to determine whether there is an issue warranting a civil rights investigation, or should we expect DOJ to ignore the member's request?

ANSWER: The Department assesses information about alleged violations of federal law received from a variety of sources, including Members of Congress, and we initiate investigations where appropriate. We hope that Members will refer to us credible information about conduct that may violate federal civil rights statutes so that we can evaluate it for law enforcement purposes.

QUESTIONS FROM CONGRESSWOMAN SÁNCHEZ

Sánchez 99 Do you support the proposal that a federal monitor be selected by a third party district court judge or magistrate judge from a pool of pre qualified individuals or firms?

ANSWER: On March 7, 2008, the Department issued a series of nine principles regarding the *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (the "Monitor Principles"). Principle 1 establishes a careful set of procedures for monitor selection in corporate DPAs and NPAs that provide for a monitor, which are designed to produce a highly respected and qualified monitor, to avoid potential and actual conflicts of interest, and to otherwise instill public confidence. These procedures make it unnecessary to impose upon the courts the task of selecting a monitor in DPAs. In any event, given the wide variety of circumstances in which a monitor may be appropriate -- and the unique expertise that may be required of a monitor in any given case -- it would be unwise to require that monitors be selected from a pre-qualified pool of candidates. See Monitor Principles, Principle 1, comment ("Because a monitor's role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance.").

Sánchez 100 We know that deferred prosecution agreements for corporations date back at least to January 20, 2003 when Deputy Attorney General Larry Thompson first issued a Department memorandum instructing federal prosecutors to seek these agreements when possible. However, in the five years since that time, the Department of Justice has not issued any formal guidelines on this practice and has never outlined the parameters of such agreements. Therefore, attorneys cannot properly advise their corporate clients when such issues arise. Without explicit guidelines for these agreements, federal prosecutors possess unmitigated discretion over deferred prosecution agreements. Will you instruct the Department to issue explicit guidelines on deferred prosecution agreements that attorneys as well as the general public can rely upon? Why or why not?

ANSWER: Deferred prosecution agreements date back to at least 1994, when the United States Attorney's Office for the Southern District of New York entered a DPA with Prudential Securities. A memorandum to federal prosecutors intended to organize and clarify the principles they have used to make charging decisions regarding corporate entities was first issued by Deputy Attorney General Eric Holder in 1999, revised by Deputy Attorney General Larry Thompson in 2003, and revised again in December 2006 by Deputy Attorney General Paul McNulty; it is known as the *Principles of Federal Prosecution of Business Organizations*. These memoranda have never instructed federal prosecutors to seek DPAs when possible. Instead, the memoranda contemplate a spectrum of charging options ranging from declination to non-prosecution agreement to deferred prosecution agreement to pre-indictment plea agreement to indictment, and the decision regarding which option to pursue is very case-specific, as it is in cases involving individuals. However, these memoranda, and the many cases handled applying them over almost a decade, have provided much more guidance than previously existed to prosecutors, defense counsel, corporations, and others. The Monitor Principles issued on March 7, 2008, provide additional guidance on one aspect of some DPAs and non-prosecution agreements (NPAs) with corporations – the selection and use of monitors in such agreements. In addition, the Department will continue to identify and promote best practices in the use of deferred and non-prosecution agreements and will consider adopting additional guidance as appropriate.

Sánchez 101 If you plan to issue guidelines, when will they be implemented?

ANSWER: Please the response to Question 100.

Sánchez 102 Monica Goodling, former Senior Counsel to Attorney General Alberto Gonzales and the Department's White House Liaison, testified before this Committee that she crossed the line in taking party affiliation into account in the hiring of career Department of Justice employees. Although we still do not know the scope of the effort to populate career positions at the Department with partisans, I am concerned that many Department employees hired for an improper partisan purpose have been placed in career positions that will outlast the tenure of this Administration. What have you done to address this concern?

ANSWER: The Department's Office of Inspector General and Office of Professional Responsibility have been conducting a thorough investigation into allegations that Ms. Goodling took improper considerations into account when making recommendations with respect to certain career employees. The Department is cooperating with that investigation. The Department will take any necessary and appropriate follow-up actions when that investigation is completed and the joint report is finished.

Sánchez 103 The State Criminal Alien Assistance Program (SCAAP) reimburses states for the cost of detaining criminal aliens. The program recognizes that immigration is an issue demanding federal solution. Therefore, it is unfair to force states and localities to foot

the bill for incarcerating these criminal aliens, bills that can often run high enough to deprive state and local law enforcement agencies of vital funds needed for new programs, equipment purchases and training. In 2002, President Bush allocated $265 million for SCAAP in his budget. Since then, including the recently released FY2009 Budget, he has allocated nothing for this indispensable program in his budget. Do you believe that it is important to reimburse states and localities for the cost of detaining criminal aliens?

ANSWER: The Department recognizes that immigration is a challenge facing states nationwide and one which requires a multi-pronged response, including effective partnerships and strategies to help reduce the number of criminal aliens jurisdictions detain each year.

Sánchez 105 Would you do so for the future, were you to retain your position as Attorney General?

ANSWER: Budget requests for each Fiscal Year are based on a wide range of complex law enforcement and criminal justice concerns and priorities. The Attorney General will continue to ensure that priorities are systematically reviewed and that the Department's budget requests are well-founded to address both national security and public safety needs.

Sánchez 106 Why do you believe the Bush Administration is abandoning state and local law enforcement agencies by refusing to reimburse funds that could be used for training, equipment purchases, and new programs that make communities safer?

ANSWER: Supporting jurisdictions in the development of sensible and stable responses to concerns involving criminal aliens is of vital importance to the Administration and the Department of Justice. The Department will continue to work with jurisdictions to explore strategies to reduce the number of criminal aliens jurisdictions must detain.

Sánchez 107 SCAAP has been chronically under-funded and reimburses states and localities for only a small portion of what they spend. The problems don't stop there; the program also significantly delays reimbursements crucial to their everyday functioning. Counties and states often can't afford to wait for these essential resources. Do you believe that states and localities should have to wait for up to two years to receive their reimbursements? Please explain.

ANSWER: The reporting period for FY 2007 SCAAP funding was July 1, 2005 - June 30, 2006. The FY 2007 SCAAP application period closed on July 18, 2007, and jurisdictions were notified on November 15, 2007 that their awards were available for drawdown.

Sánchez 108 I have a bill that would ensure that every state and locality receives reimbursement for incarcerating criminal aliens in a timely manner, by requiring the

Department of Justice to make reimbursements within 120 days of the application deadline. Would you be supportive of that deadline?

ANSWER: The SCAAP cycle for FY 2007 applications closed on July 18, 2007. Jurisdictions were notified on November 15, 2007, that their awards were available for drawdown, meeting a 120 day timeframe from the application deadline to reimbursement.

Sánchez 110 What can Congress do to help you speed up the process?

ANSWER: The FBI appreciates the emphasis Congress has placed on accelerating the name check process, including recent funding that has made some of the improvements in this process possible. We look forward to ongoing discussions with this Committee to ensure the FBI remains on track in its efforts to improve the efficiency of this process while continuing to fulfill its role in protecting national security.

Sánchez 111 The name-check process does not differ if an individual has been in the United States for many years or a few days, if an individual has or has not traveled frequently to a country designated a State Sponsor of Terrorism, or even if the person is a member of the US military. Many individuals who are subject to lengthy name-checks already have green-cards and employment authorization documents. Why has the FBI, in conjunction with the Department of Homeland Security, refused to implement a risk-based name-check process?

ANSWER: The FBI and USCIS have jointly developed revised criteria for identifying unproductive searches, meaning searches that have historically produced no derogatory information and pose minimal risk. Application of this "Super Filter Project" has facilitated the closure of over 15,000 name checks and eliminated over 50,000 files from the review queue.

Sánchez 112 Have you had any discussions with Secretary Chertoff about implementing a risk-based name-check process to reduce backlogs?

ANSWER: Please see the response to Question 111.

Sánchez 113 If you do not favor risk-based name-checks, what specific steps will reduce the FBI backlog and allow the Bureau to process name-checks faster?

ANSWER: Please see the response to Question 111.

QUESTIONS FROM CONGRESSMAN GOODLATTE

Goodlatte 120 The STOP! Initiative was created by this Administration and has been successful in coordinating interagency efforts against copyright piracy. However, this initiative is not permanent and could expire when a new President takes over in January. Do you believe that the STOP! Initiative has been successful?

ANSWER: The STOP! Initiative has enhanced the federal government's coordinated efforts to combat counterfeiting and piracy, in particular with respect to coordination on international IP matters. The Department has been able to work effectively with other STOP! agencies to support important Department initiatives. For example, the Department supports the IP enforcement missions of other Departments and agencies, including the Special 301 process and Free Trade Agreement negotiations run by the U.S. Trade Representative, the State Department's IP Training Coordination Group, and public outreach events for small businesses developed by the Department of Commerce. Despite the widely divergent roles played by many of the agencies involved in the STOP! Initiative, coordination and support amongst agencies has never been greater in the effort to enforce IP rights.

In addition, as part of the STOP! Initiative, the Department has continued to evaluate, improve, and expand our IP enforcement programs. The results have been significant. Through the dedicated efforts of U.S. Attorneys' Offices, our Criminal Division, and law enforcement across the country, the Department filed 217 intellectual property cases in FY 2007, representing a 33% increase over cases reported in FY 2005 (169). Moreover, in FY 2007, 287 defendants were sentenced on intellectual property charges, representing a 92% increase over FY 2005 (149).

The increase in prosecutions in FY 2007 is not an aberration, but rather reflects a continuing trend. For example, in FY 2006, federal prosecutors convicted 187 defendants of criminal copyright and trademark offenses alone – an increase of 57% over the previous year. Thirty-nine (39) of those defendants received terms of imprisonment of 25 months or more, a 130% increase from the 17 sentenced to such terms in 2005. Indeed, in the previous year (FY 2005), the Department prosecuted twice the number of defendants for intellectual property violations than it had in FY 2004.

In addition to increasing the number of domestic prosecutions, the Department has also greatly increased its efforts to coordinate criminal IP enforcement efforts with our law enforcement counterparts abroad – for example, by providing training to over 3500 prosecutors, judges and investigators from more than 90 countries in 2007. We also have improved bilateral law enforcement cooperation with key countries such as China. Those efforts, too, are paying off. For instance, on July 23, 2007, 25 Chinese nationals were arrested and more than half a billion dollars worth of counterfeit software was seized as a result of the largest ever joint investigation conducted by the FBI and the People's Republic of China. This operation, code-named "Operation Summer Solstice," was one of several cases nominated to the U.S.-China Joint Liaison Group for Law Enforcement for priority investigation and prosecution. China's Ministry of Public Security ("MPS") searched multiple businesses and residential locations and

seized more than a half billion dollars in counterfeit and pirated software, $7 million in assets, and confiscated over 290,000 counterfeit software CDs and Certificates of Authenticity. The criminal syndicate dismantled by the FBI and MPS is believed to be the largest of its kind in the world, responsible for distributing an estimated $2 billion in counterfeit Microsoft software.

Of course, the Department fully recognizes that despite the success of the STOP! Initiative, counterfeiting and piracy remain a growing problem throughout the world. The Department is therefore committed to continuing to coordinate and work with all STOP! agencies to better address this formidable enforcement challenge.

Goodlatte 121 If so, does it make sense to establish a permanent effort to coordinate the prosecution of intellectual property violations among federal agencies that will survive the transition to new Administrations?

ANSWER: The STOP! Initiative reflects the Administration's unprecedented commitment to effective protection of IP and provides an effective framework for coordinating the Administration's overall enforcement strategy. Although the STOP! Initiative facilitates coordination of enforcement strategies among federal agencies, the STOP! Initiative does not – and should not – coordinate the prosecution of intellectual property violations among federal agencies. The prosecution of criminal IP violations has always been, and remains, the exclusive provenance of the Department of Justice. Indeed, the Department is careful not to coordinate its prosecutorial decision-making with non-law enforcement agencies (e.g., USTR, Commerce). The Department's independent, impartial exercise of its criminal enforcement authority is a keystone of its statutory mission and ethical duties and is critical to its enforcement efforts in IP and other areas of the criminal law. To that extent, as with all federal crimes, the permanent effort to coordinate the prosecution of intellectual property violations is, and should remain, at the Department of Justice.

Goodlatte 123 What challenges are you facing in combating street gangs, including international gangs, and what additional tools can Congress give the FBI to help eliminate the gang scourge in our society?

ANSWER: As noted above, there are approximately one million gang members who claim membership in more than 20,000 identified gangs. Gangs are present in all fifty states, the District of Columbia, and all U.S. territories. Gangs are responsible for a large number of violent crimes committed each year in the U.S., including homicide. Many are also involved in dominating retail-level drug sales and, gangs increasingly are becoming involved in wholesale-level drug trafficking. Further, gang members increasingly engage in criminal activity across our southern and northern borders. The *Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas*, April 2008, provides additional information about the threat these gangs pose and the Department's efforts to address that threat.

In addition, the Department's National Gang Intelligence Center (NGIC), Gang Targeting, Enforcement, and Coordination Center (GangTECC) and Gang Squad Unit (GSU)

provide national, multi-agency coordination and deconfliction of gang-related investigations and intelligence to effectively target and dismantle the most significant international, national, and regional gangs. The Department's National Drug Intelligence Center (NDIC) has also established a strategic analysis cell devoted to identifying emerging trends and patterns associated with the threat posed by gangs nationwide. For more information on this and other Department efforts please refer to the *Fact Sheet: Department of Justice Comprehensive Efforts to Fight Gang Violence*, issued March 26, 2008, and pages 11-23 of the *Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas, April 2008.*

The Department has previously proposed, and continues to support, a number of provisions to improve violent crime prevention and strengthen anti-gang measures. Examples include proposals that would:

1. Strengthen the statutory prohibition on illegal firearm transfers by doubling the maximum penalty for transferring a firearm that will be used to commit a crime of violence or drug trafficking offense, thereby improving both general and specific deterrence;

2. Increase the maximum penalty for the general federal criminal conspiracy statute, making the conspiracy statute more useful in prosecuting conspiracies to commit offenses such as firearms offenses and bringing the maximum penalty for conspiracy in line with the sentencing guidelines;

3. Extend the statute of limitations for violent crimes from five years to ten years, allowing prosecution of a greater range of cases; and

4. Create a new statutory enhancement for crimes of violence by illegal aliens, which would be particularly useful in cases in which foreign gang members commit serious violent crimes.

Goodlatte 126 Increasingly, we are hearing reports about the serious problem of organized retail theft rings. Most recently, we heard of an organized retail crime ring bust involving 18 people and possibly $100 million worth of medicine and health and beauty goods from convenience and grocery stores. Does the Department see Organized Retail Crime as a serious concern and will the Department commit to working with Congress to find ways to address this growing problem?

ANSWER: The Department views Organized Retail Crime as a serious concern, and continues to devote substantial resources to fighting this crime problem. We are pleased to continue our dialogue with Congress to review the efforts we have made, and continue to make, in this area.

For example, pursuant to Section 1105 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, P.L. 109-162, in 2006, the Attorney General and the FBI, in consultation with the retail community, initiated a organized retail theft task force. The task force, staffed by DOJ and FBI personnel worked closely with the National Retail Federation (NRF) and the Retail Industry Leaders Association to create the Law Enforcement Retail

Partnership Network (LERPnet). This online database, which is housed and run by the private sector, allows retail members to track and identify organized retail theft via a secure web portal. LERPnet was implemented in April 2007, with 32 retailers representing 46,000 stores, and 16,000 organized retail theft incidents included in the system. Law enforcement will be able to access LERPnet via Law Enforcement Online to search reported incidents and track retail theft throughout the country. A Memorandum of Understanding between the FBI and the NRF to provide this access is in its final review phase. This partnership between law enforcement and private industry provided for greater efficiency in fighting organized retail theft, enabling increased arrests, prosecutions, and recoveries of stolen merchandise, and for the first time, provided a "predictive" tool using crime patterns to anticipate future criminal activity.

Even prior to the creation of the task force, the FBI undertook major efforts to fight organized retail theft. For example, the FBI's Major Theft program, which includes ORT, continues the following activities. The FBI's nine Major Theft task forces, established through a Safe Streets Violent Crime Initiative operating since the mid-1990s, continue communication and coordination of ORT issues between the FBI and state/local law enforcement agencies in eight major cities. In December 2003, the FBI established a national ORT initiative, the first phase of which included a joint venture with the National Retail Federation (NRF). Currently, nine FBI-led Major Theft task forces located in the Houston, Memphis, Miami (with 2 task forces), Newark, New York, Philadelphia, San Juan, and Washington, D.C., Divisions serve as force multipliers, increasing the effectiveness of efforts to counter ORT by improving the coordination of Major Theft investigations.

ANSWERS TO POST-HEARING QUESTIONS PROVIDED BY THE
U.S. DEPARTMENT OF JUSTICE, DATED JULY 18, 2008

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 18, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions for the record posed to Attorney General Michael B. Mukasey following his appearance before the Committee on February 7, 2008. The hearing concerned Department of Justice Oversight. This submission supplements our transmittal dated July 16, 2008, and provides responses to the remaining questions posed by the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to the submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Lamar Smith
Ranking Minority Member

Questions for the Record Posed to
U.S. Attorney General Michael B. Mukasey
House Committee on the Judiciary
DOJ Oversight Hearing on February 7, 2008

QUESTIONS FROM CHAIRMAN CONYERS

Conyers 1 The Committee sent you several questions in a January 31, 2008, letter in advance of the hearing, and after having not received responses to them prior to the hearing, we reiterated that request via an e-mail to the head of the Office of Legislative Affairs, Brian Benczkowski, immediately following the hearing. As of today, we still have not received any responses to those questions. Please respond to the questions in that letter by C.O.B. March 7, 2008.

ANSWER: As the Chairman noted in his July 15, 2008 letter to the Attorney General, the questions in the January 31, 2008 letter to the Attorney General were either answered during the February 7, 2008 hearing or in included in the follow-on Questions for the Record. Therefore, with this submission, we believe we have responded to the Chairman's questions and ask the Chairman to advise the Department if he believes there are still outstanding questions from his January 31 inquiry.

Conyers 3 The Committee has twice written to the Department, including to you personally, asking for memoranda on the legality of CIA interrogation methods, reportedly including waterboarding, that the Office of Legal Counsel prepared. As you know, one reason Mr. Bradbury has not been confirmed is because those memoranda have not been turned over to the appropriate congressional committees. Since you have assured Congress that waterboarding is no longer a technique available to the CIA or Department of Defense, will you now supply those memoranda to our committee? If not, why not?

ANSWER: The Administration has made extraordinary accommodations in recent months to accommodate Congress's interest in these matters. Highly classified opinions concerning the Terrorist Surveillance Program have been made available to, among others, the Intelligence and Judiciary Committees of both Houses of Congress. As to the CIA's interrogation program, the Intelligence Committees have been briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Since the Attorney General's testimony, the Administration has further accommodated congressional interest in this subject by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration has made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Conyers 4 In response to my questions during the hearing, you expressed a willingness to have a dialogue regarding the Committee's desire to acquire the legal memoranda authorizing the CIA's enhanced interrogation techniques. Do you remain committed to that dialogue in an effort for the Committee to obtain those memoranda? If not, why not?

ANSWER: Yes.

Conyers 5 During the hearing you testified that you would not authorize a criminal investigation into the C.I.A.'s use of waterboarding because they relied on Department of Justice advice. It is the Committee's understanding that a memo authorizing waterboarding was not written until 2005, well after the waterboarding occurred. There was another memo authorizing aggressive interrogations that was authored in 2002. Is it true that the Department revoked that memo?

ANSWER: Before the CIA used the technique of waterboarding on three al Qaeda detainees in 2002 and 2003, the Department of Justice advised the CIA that it was lawful. Your question concerns an August 2002 memorandum from Assistant Attorney General for the Office of Legal Counsel Jay Bybee, which interpreted the scope of the anti-torture statute but does not address any specific interrogation techniques. The Department concluded in 2004 that the August 2002 memorandum was erroneous in several respects and withdrew that memorandum.

Subsequently, the Department provided its views on the anti-torture statute through a public December 2004 opinion from Acting Assistant Attorney General Daniel Levin. That memorandum superseded the withdrawn August 2002 memorandum in its entirety, and it reflects the Department's current views on the scope of the anti-torture statute. Like the August 2002 opinion, the December 2004 opinion does not address specific interrogation techniques. It did note, however, that the Office of Legal Counsel had reviewed all prior opinions addressing particular interrogation practices and concluded that the authorized conduct permitted under those opinions remained permitted under the standards in the December 2004 opinion. *See* December 2004 Opinion at 2 n.8.

Conyers 6 Is it your opinion that a person who relies on any Department opinion, especially one that has been revoked, is immune from criminal investigation or prosecution? If so, please explain.

ANSWER: It is vital that our intelligence professionals be able to rely on the advice of the Department about what the law permits and what it does not. They will be unable to perform their duties to protect the country if they fear that the advice provided by one Attorney General will survive only as long as the tenure of the person who gave it, and that a subsequent Attorney General could revoke his predecessor's opinion and disregard their prior reliance in deciding whether they acted within the law. Accordingly, no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice.

Conyers 7 As you well know, Department regulations require the appointment of an outside special counsel if an investigation would cause the Department to have a conflict of interest. If you believe, as your testimony indicated, that a person cannot be criminally prosecuted if he/she relied on Department opinions, doesn't that mean that the Department has a conflict of interest and that an outside special counsel should be appointed. If not, please explain.

ANSWER: No. The fact that the Department of Justice provided legal advice to a government agency does not constitute a conflict of interest warranting the appointment of a special counsel. If it did, then no government agency could ever rely upon the Department's advice as an authoritative guide for what the law permits and what it does not. It is vital, however, that our intelligence professionals, in seeking to comply with the law, be able to the advice of the Department. Accordingly, no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice. The Department of Justice does not have any conflict of interest in applying such a principle, which is required by law and by fundamental fairness.

Conyers 8 In light of the possible conflict posed by the Department's investigation, wouldn't it be more prudent for an outside special counsel to assess this issue and determine, for example, if the Department's advice was lawful or the person's reliance on it was reasonable. If not, why not?

ANSWER: No, we do not think there is any such conflict.

Conyers 9 In light of the fact that the Office of Professional Responsibility is investigating the circumstances surrounding the Department's opinions that established a legal basis for the CIA's interrogation program, why do you still maintain that Mr. Durham's investigation should not also encompass the enhanced interrogation techniques depicted on the destroyed videotapes?

ANSWER: As the Department has explained, if our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, they should not be subject to criminal investigation for it.

Conyers 10 Did you select or have input into the selection of your leadership team, including your Chief of Staff, Deputy Attorney General, Associate Attorney General, and the heads of key components such as the Criminal Division, the Civil Rights Division, the Office of Legal Counsel, and the Office of Public Affairs?

ANSWER: While the prerogative to nominate an official is the President's, the Attorney General had principal input into the selection of all officials nominated by the President to serve in the Department of Justice, including for the positions of Deputy Attorney General and

Associate Attorney General. The Attorney General also selected officials to serve in non-Senate confirmed positions, including Chief of Staff. Some of the officials referenced in your question, such as the Director of the Office of Public Affairs, were appointed prior to the Attorney General's confirmation. The Attorney General did not play a role in the selection of such officials.

Conyers 11 What type of input did you have?

ANSWER: See response to Question 10.

Conyers 12 Did you have veto power over the individuals selected for these positions?

ANSWER: The prerogative to nominate officials to Senate-confirmed positions is the President's. The Attorney General, however, has been in full agreement with the selection of individuals nominated or appointed after his confirmation.

Conyers 13 Were any individuals suggested by you for any of these positions ultimately not selected?

ANSWER: It would not be appropriate for the Attorney General to discuss internal deliberations with respect to personnel matters. As noted above, however, the Attorney General has been in full agreement with the selection of individuals nominated or appointed after his confirmation.

Conyers 14 On October 3, four members of the Committee sent your predecessor a letter about two major vote suppression matters in New Hampshire and Nevada and elsewhere. That letter posed seven specific questions about the Department's handling of these cases. On December 20, Chairman Conyers followed up after a disturbing news article reported that senior Department officials had "slowed the inquiry" in order "to protect top GOP officials." That letter asked the Department to provide information that would allow cooperative interviews on this subject to be conducted. The Department responded on January 22, 2008 and on February 11, 2008. The Department's response ignored many of the specific questions posed in the members' October 3rd letter. Therefore, please answer the following remaining questions: Please identify any limitations or constraints placed by Administration or Department officials on the Phone Jamming and Sproul investigations, including limits on the scope of the investigations, on investigative techniques that could be employed, on permissible subjects or targets of the investigations, on geographic locus of the investigation, or any other limitations on the investigations' reach. In particular, specifically address the claims that all case decisions regarding the Phone Jamming matter had to be personally approved by the Attorney General.

ANSWER: The Department of Justice places a high priority on investigating and prosecuting federal crimes affecting voting rights and the integrity of the federal election process. All credible allegations are investigated and, where appropriate, prosecuted to the full extent of federal law.

The Department of Justice and the FBI conducted an investigation into a scheme to jam telephone lines that were used for get-out-the-vote and ride-to-the-polls programs on Election Day in New Hampshire in November, 2002. The investigation was conducted aggressively by career prosecutors in the Department's Criminal Division and FBI agents. On July 28, 2004, Charles McGee, the former Executive Director of the New Hampshire Republican State Committee, pled guilty to conspiracy to commit telephone harassment. McGee was sentenced to seven months incarceration. On June 30, 2004, Allen Raymond, a private consultant and former Regional Director of the Republican National Committee, pled guilty to conspiracy to commit telephone harassment. Raymond was sentenced to three months incarceration. On December 15, 2005, James Tobin, a former Regional Director of the Republican National Committee and of the National Republican Senatorial Committee, was convicted at trial of conspiracy to commit telephone harassment and of aiding and abetting telephone harassment. Tobin was sentenced to ten months incarceration. On March 30, 2007, a federal appeals court reversed Tobin's conviction, and the case was remanded to the United States District Court for the District of New Hampshire for further proceedings. On February 21, 2008, the trial judge issued an order granting Tobin's motion for a judgment of acquittal, and the Department of Justice has filed a notice of appeal. Finally, Shaun Hansen, formerly a telemarketing vendor from Sand Point, Idaho, is under indictment for his role in the phone-jamming scheme.

The phone jamming cases were handled by the Criminal Division's Computer Crime and Intellectual Property Section and the Public Integrity Section, in addition to the FBI. They were handled according to the Department's normal procedures, and we are aware of no basis for the claim that all decisions regarding this case had to be personally approved by the Attorney General. In fact, we are not aware of any instance in which the Attorney General had personal involvement in this matter. We are not in a position to provide additional non-public information about the Tobin and Hansen cases based upon our long-standing policy on pending matters, ethical considerations and Rule 6(e) of the Federal Rules of Criminal Procedure. We can advise you, however, that this matter was pursued thoroughly and aggressively, and all appropriate investigative avenues were pursued. We have no information indicating that the FBI was ever asked, or directed to refrain from, gathering evidence regarding any person or from any geographical location.

Turning to the Sproul matter, the Department received allegations that Sproul & Associates destroyed voter registration forms that had been completed by Democratic registrants in connection with the 2004 general elections. These allegations were investigated by the FBI and career prosecutors in the Department's Criminal Division and the United States Attorneys' Offices in the Districts of Arizona, Nevada, and Oregon. We have no information suggesting that anyone in the FBI, the Criminal Division, or a United States Attorney's Office was ever asked by a Department or Administration official to limit the scope of the investigation, including its witnesses, subjects, targets, investigative techniques, or geographical locations. Normal investigative procedures were followed in this matter, and all investigative leads were pursued.

Conyers 15 Please identify all Department offices, divisions, and entities involved in the Phone Jamming and Sproul investigations at any time.

ANSWER: The Phone Jamming cases were handled by the FBI and the Criminal Division's Computer Crime and Intellectual Property Section and the Public Integrity Section under the general supervision of the Criminal Division.

The Sproul matter was handled by the FBI and career prosecutors in the Department's Criminal Division and the United States Attorneys' Offices in the Districts of Nevada, Oregon, and Arizona.

Conyers 16 Please describe all steps taken to determine whether or not any White House personnel, Bush/Cheney campaign personnel, or other officials or leaders of any Republican Party organization had any knowledge of, involvement in, or potential liability regarding the Phone Jamming or Sproul matters.

ANSWER: As indicated in the response to Question 14, we are not in a position to provide additional non-public information about the Phone Jamming cases based upon our long-standing policy on pending matters and Rule 6(e) of the Federal Rules of Criminal Procedure. We can advise you, however, that this matter was pursued thoughtfully and aggressively, and all appropriate investigative avenues were pursued. We have no information indicating that the FBI was ever asked or directed to refrain from gathering evidence regarding any person or from any geographical location.

The Department also aggressively pursued the Sproul matter. The allegations suggested a serious federal crime – conspiring to interfere with the right to vote in a federal election for partisan purposes. Accordingly, investigations were opened in the three United States Attorneys' Offices where the alleged conduct occurred. Numerous witnesses in four different states were interviewed, substantial documentary evidence was reviewed, and all investigative leads were pursued. Moreover, there were no constraints placed on the scope or nature of the investigation.

Conyers 17 Please explain why the Nevada and related matters were considered not worthy of charges where numerous witnesses described to the press engaging in serious misconduct such as refusing to accept registrations from Democratic voters and destroying Democratic voter registration cards.

ANSWER: The statements relating to possible destruction of voter registration forms in Nevada and elsewhere were thoroughly investigated by three different districts, but we were unable to corroborate the allegations. In short, the investigation failed to produce evidence of a federal crime. As a result, the prosecutors and investigators handling the matter concluded that charges could not be brought.

Conyers 23 Chairman Conyers sent a letter on January 31, 2008, following a letter from 18 Committee members on January 15, 2008, asking you to explain the scope of AUSA Durham's investigative authority and articulate any limits that might be placed on the investigation's scope, jurisdiction, subject matter and methods. During your January 30, 2008, Senate testimony, Senator Leahy raised concerns about the lack of independence of AUSA Durham who, since he is a current AUSA and appointed under 28 U.S.C 510, could have been given the plenary authority that the Acting Attorney General granted to Patrick Fitzgerald to investigate the Valerie Plame case but wasn't. Is it your position that any information or evidence can be withheld from AUSA Durham?

ANSWER: The Department is committed to conducting a comprehensive and impartial investigation into the CIA's acknowledged destruction of videotapes of certain interrogations of detainees. For purposes of this investigation, Mr. Durham has been appointed as the Acting United States Attorney for the Eastern District of Virginia. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations. Mr. Durham has been authorized to follow this investigation wherever the evidence leads, and his investigation will proceed in accordance with established Department policies on all matters related to his investigation.

Conyers 24 If yes, then: On what grounds?

ANSWER: Please see the response to Question 23.

Conyers 25 Who would make that decision?

ANSWER: Please see the response to Question 23.

Conyers 26 What, if any, recourse does AUSA Durham have?

ANSWER: Please see the response to Question 23.

Conyers 27 Can he appeal to a court?

ANSWER: Please see the response to Question 23.

Conyers 28 If no, then: At the conclusion of the investigation, if AUSA Durham concludes that prosecution is appropriate, do you retain the power to override that decision? If so, on what grounds?

ANSWER: Please see the response to Question 23.

Conyers 29 If the prosecution can ultimately be squashed over AUSA Durham's objection, then why not specify that Mr. Durham has the same plenary authority as granted Mr. Fitzgerald? Please explain.

ANSWER: Please see the response to Question 23.

Conyers 30 In recent cases challenging the constitutionality of rendition to torture or warrantless wiretapping, the Justice Department has argued that the government's decision that the state secrets privilege applies must be given "utmost deference" by judges. Under this standard, how and in what circumstances can a court ever disagree with the Government? Please explain.

ANSWER: The Department of Justice does not lightly invoke the state secrets privilege, but when national security concerns require that we do so, the federal courts have long recognized that the separation of powers requires that the "utmost deference" be given to the assertion of the privilege. The state secrets privilege is not a mere common law privilege, but rather one firmly rooted in the separation of powers under our Constitution, which provides the President with the "authority to classify and control access to information bearing on national security." *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also id.* (recognizing that this "authority . . . flows primarily from" the President's constitutional authority under Article II as Commander in Chief "and exists quite apart from any explicit congressional grant"); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (a claim of privilege based on military or diplomatic secrets necessarily involves "areas of Art. II duties" assigned to the President); *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007) (holding that state secrets privilege "has a firm foundation in the Constitution").

Courts have demonstrated respect for this authority by providing that the Executive's assertion of state secrets privilege must be given the "utmost deference." *E.g.*, *Nixon*, 418 U.S. at 710; *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1988); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978). As courts have recognized, providing "utmost deference" to the judgment of the Executive Branch is appropriate not only for constitutional reasons, but also for the practical reasons that national security officials "occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information." *El-Masri*, 479 F.3d at 305; *see also Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.").

Of course, the fact that the judiciary defers in this area does not mean that the courts have no meaningful role in reviewing the propriety of an assertion of the state secrets privilege. Rather, the court must satisfy itself that the United States has shown that there is "a reasonable danger that compulsion of the evidence" will expose state secrets which, in the interest of national security, must not be disclosed. *United States v. Reynolds*, 345 U.S. 1, 10 (1953). To

aid the court in conducting such a review, the Executive Branch often provides classified declarations (to be reviewed by the court on an *in camera* and an *ex parte* basis) that describe in detail the classified information subject to the state secrets privilege and the specific harm to national security that would follow from its disclosure. Our experience has been in recent years that courts frequently find the Government's assertion of the privilege to be well-justified. *See Al-Haramain Islamic Found.*, 507 F.3d at 1203-04 (finding the basis for the Government's assertion of the state secrets privilege to be "exceptionally well documented"); *El-Masri*, 479 F.3d at 312 (noting the "extensive information" in United States' classified filing that set forth "in detail the nature of the information that the Executive seeks to protect and explains why its disclosure would be detrimental to national security" and rejecting the view that judicial review is "simply an unthinking ratification of a conclusory demand by the executive branch."). Where courts have additional questions as to the basis for the Government's assertion of the privilege, the practice has been for the Government to answer those questions through further *ex parte*, *in camera* submissions so as to demonstrate that the privilege has been properly asserted in a particular case.

Conyers 31 Have you directed all DOJ personnel – including politically appointed personnel in the Office of Legal Counsel and elsewhere – to fully cooperate with the Office of Inspector General (OIG) and Office of Professional Responsibility (OPR) in all pending investigations?

ANSWER: Since existing Department policy and regulations on cooperating with OIG and OPR inquiries address this issue, there has been no need to provide additional direction.

Conyers 32 To your knowledge, have DOJ personnel asserted Executive Privilege or other privileges in response to inquiries by OIG/OPR?

ANSWER: OIG and OPR are jointly conducting an investigation into these matters. Therefore, it would be inappropriate to respond to this question.

Conyers 33 Have you directed DOJ personnel not to assert Executive Privilege in response to inquiries? If not, why not?

ANSWER: Please see the response to Question 32.

Conyers 34 To your knowledge, has the White House or Office of Vice President attempted in any way to limit the OIG's or OPR's access to information in the possession of DOJ attorneys – in OLC or other components – either by instructing them not to cooperate, or instructing them to assert Executive Privilege? If so, please explain.

ANSWER: Please see the response to Question 32.

Conyers 35 Will you discipline or fire persons who do not fully cooperate with the OIG or OPR? If not, why not?

ANSWER: The Attorney General is not aware of any current Department employees who have not cooperated with the OIG or OPR.

Conyers 36 As you know, OIG and OPR are undertaking an investigation into the dismissal of United States Attorneys and other allegations of politicization in your Department. Are any former or current employees of the Justice Department refusing to cooperate in that investigation? If so, who?

ANSWER: Please see the response to Question 32.

Conyers 37 For 3 ½ years, DOJ argued that national security required the military detention of Mr. Padilla, an American citizen arrested in the U.S., as an unlawful enemy combatant. Representations were made to you as a federal judge and to other courts. But within a few weeks of the Fourth Circuit's opinion in September, 2005, approving the military detention of Padilla based on DOJ's representations, the Administration made the decision to move Padilla to civilian courts to face federal charges, thus mooting out Supreme Court review. The Fourth Circuit commented that DOJ's actions created "at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court." Padilla v. U.S., 432 F.3d 582, 583 (4th Cir. 2005). The Committee is aware that Padilla has since been found guilty in the civilian courts – and express no opinion on that case – but remain concerned that an American was placed in custody for years based upon representations that even the Fourth Circuit – hardly a liberal court – has concluded may not have been credible. The court specifically commented that the result may "ultimately prove to be substantial cost to the government's credibility before the courts." 432 F. 3d at 587.The Committee recognizes that you were not the Attorney General when this occurred, but that it was a matter with which you had significant familiarity as a federal judge. As Attorney General, though, have you examined, or asked the Office of Professional Responsibility (OPR) or the Inspector General, to examine the source and truthfulness of the representations that Department of Justice attorneys made to the various courts – including you – in support of the Administration's efforts to have Mr. Padilla held? If no, will you do this?

ANSWER: No. The Department's understanding is that the representations made to the courts by Department attorneys were accurate based on the circumstances as they existed at each point in time. The Department correctly concluded that by the time the transfer was made it had become possible to charge and try Jose Padilla in federal court, consistent with the requirements of national security.

Conyers 38 Isn't it standard procedure that OPR investigate allegations that a DOJ attorney made false assertions before a federal court that were not credible?

ANSWER: Yes. OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice. OPR investigates non-frivolous, credible allegations that Department attorneys made misrepresentations to a court. OPR also investigates judicial findings that Department attorneys made misrepresentations to the court.

Conyers 39 Particularly in light of the concern that this episode may substantially harm DOJ's credibility before the courts, have you examined the question of who made the decision to transfer Mr. Padilla to the federal courts? If not, why not?

ANSWER: Again, the Department's understanding is that the representations made to the courts by Department attorneys were accurate based on the circumstances as they existed at each point in time. As Jose Padilla's conviction demonstrates, the Department correctly concluded that by the time the transfer was made it had become possible to charge and try him in federal court. Since I have been Attorney General, I am not aware of any circumstance that indicates that the concern you note above has been realized.

Conyers 40 To what extent was avoiding Supreme Court review a factor in that decision?

ANSWER: The Department has a strong interest in maintaining the confidentiality of internal deliberations on matters such as this, especially matters involving sensitive and important national security interests. The decision was made on the basis of the circumstances as they existed at the time, including that by the time a decision was required, it was possible to charge and try Mr. Padilla in a federal court.

Conyers 41 As you know, this Committee held a hearing last year to investigate the Jena 6 incident, in which four black juveniles in Louisiana were charged with attempted murder and jailed following a school yard fight, and to examine the failure by U.S. Attorney Donald Washington to pursue hate crimes charges against the two white students who retaliated by hanging nooses from a school yard tree. Since the Jena 6 incident, there have been numerous high profile incidents of noose hangings, including one found in a black Coast Guard's bag, one on a Maryland college campus, and on the office door of a black professor at Columbia University in New York, just to name a few. But what is the status of hate crimes charges within the Department concerning these deplorable noose-hanging incidents at this time, including the specific incidents I have just listed?

ANSWER: As you know, in the aftermath of the civil rights marches in Jena, Louisiana, nooses have been discovered in workplaces, near schools, and outside the homes of African

Americans in Louisiana and elsewhere. The media reports of these nooses have sparked national outrage over racial intolerance and hate crimes.

Accordingly, last fall, the Department's Civil Rights Division launched a racial threats initiative to prioritize and expedite investigations into these incidents. The Civil Rights Division, the U.S. Attorneys' Offices, and the Federal Bureau of Investigation, in conjunction with state and local law enforcement, are aggressively investigating these incidents as well as other allegations of racially motivated violence. As part of this initiative, the Department prosecuted a case near Jena involving nooses hung from the back of a truck that slowly and repeatedly circled around a group of peaceful civil rights demonstrators who were waiting at a bus depot. On April 25, 2008, the defendant pled guilty to a federal hate crime. He is scheduled to be sentenced on August 15, 2008. The Department is fully mobilized to ensure that, where supported by the facts and the law, appropriate action is taken.

The allegation you mention regarding a noose "found in a black Coast Guard's bag" was handled by the Coast Guard. While we cannot comment on other specific instances that may be under investigation, the Department remains as committed as ever to prosecuting those responsible for racially motivated threats in every form, including cross burnings, phone threats, assaults, and hanging nooses. Our commitment to racial justice is enduring.

Conyers 48 In FY2008, the Department of Justice (DOJ) requested funding for twenty additional Immigration Judges and ten staff attorneys and support staff to handle the increase in EOIR's workload. But in its budget request for FY2009, DOJ is not requesting additional full-time employees for EOIR, despite the continuing increase in immigration enforcement personnel and activities that will likely result in a greater workload for EOIR. For example, the number of the Department of Homeland Security (DHS)'s Fugitive Operations Teams (FOTs) for United States immigration and Customs Enforcement (ICE) has increased from 15 teams in 2005, to 50 teams in 2006, to 75 teams in 2007. That number will grow to 104 teams in FY2008. Likewise, ICE has also greatly increased certain types of enforcement in the same time period. For example, administrative arrests in worksite enforcement actions have grown from 485 in FY 2002 to 4,077 in FY 2007.Can you please explain why DOJ did not request additional full-time employees for EOIR given the expected increase in EOIR's workload due to increased immigration enforcement actions by DHS?

ANSWER: Mindful of the various immigration enforcement initiatives undertaken or planned by the Department of Homeland Security, EOIR requested significant program increases during FY 2006, 2007, and 2008. At the time the FY 2009 request was under development, EOIR had already received authorization and start-up funding for 120 new positions (20 immigration judges, 20 judicial law clerks, 10 Board of Immigration Appeals (BIA) staff attorneys, and support staff) through the FY 2006 War Supplemental appropriation. Further, EOIR requested and received a second 120-position increase in the FY 2007 budget. For FY 2008, EOIR requested, as a program increase, the permanent funding required to support the 120 positions received through the 2006 War Supplemental. As such, EOIR's FY 2009 request targets critical and mandatory information technology initiatives, such as Digital Audio Recording.

EOIR is still hiring additional judges, Board members and staff. In March 2008, 13 new judges will enter on duty with hiring continuing for an additional 25 judges. EOIR also increased the number of law clerks from 35 in FY 2007 to 55 in 2008. Finally, EOIR and the Department are currently in the process of increasing the size of the BIA to 15 permanent members, up from the previous ceiling of 11 members.

Conyers 57 FBI conducts name checks for U.S. Citizenship and Immigration Services (USCIS), which uses the results, in addition to other criminal, immigration and national security checks, to complete adjudication of certain applications for immigration benefits, including naturalization and adjustment of status. As you are aware, there are over 300,000 USCIS requests for name checks pending with FBI. Of those, over 130,000 have been pending for more than six months, 46,000 have been pending for two years, and 25,000 have been pending for more than 33 months. Because of the delays in processing name checks, approximately 4,500 law suits, including at least eight class actions, have been filed seeking mandamus relief. U.S. Attorneys and the Office of Immigration Litigation (OIL) are called on to defend these actions. How many USCIS-requested name checks are currently pending with FBI?

ANSWER: The FBI's records indicate that, as of July 4, 2008, there were 186,802 USCIS name checks pending with the FBI. This is a reduction from 402,176 pending at the end of Fiscal Year (FY) 2007.

Conyers 58 How many have been pending for more than six months? Over one year? Over two years? Over three years? Over four years?

ANSWER: The FBI's records indicate that, as of July 4, 2008, 123,927 name checks have been pending for more than 180 days, 25,329 have been pending for more than one year, 1,127 have been pending for more than two years, and none have been pending for more than three years. These numbers are cumulative; thus, for example, the number of USCIS name checks pending for more than one year (25,329) includes the USCIS name checks pending for more than two years (1,127). In accordance with the FBI's business plan with USCIS, on March 31, 2008, the FBI closed out USCIS name checks pending over four years and at the end of May 2008 closed out USCIS name checks pending for more than three years.

Conyers 59 In both raw number and percentage terms, what is the incidence of "hits" the FBI finds in connection with USCIS name check requests?

ANSWER: For FY 2008 through July 14, 2008: 1,259,840 name checks have been received from USCIS, not including duplicate submissions that were already in the name check system and submissions with errors that could not be processed. Of the 1,259,840, 828,281 (66%) were completed in the batch phase of the name check process, which means these were returned to USCIS as "no record" responses (i.e., no hits). Of those remaining, 231,874 (18% of the

incoming) were completed within 30 to 60 days, which generally means that after an additional manual review these name checks were returned to USCIS as "no record" responses. The remaining 199,685 name checks (16% of the incoming) continued through the name check process beyond 60 days.

Conyers 73 Historically, vote caging schemes have been used to suppress minority votes. When allegations of vote caging occurred in 1990 the DOJ took swift action, sending the FBI out immediately to investigate. The Department filed a federal lawsuit against the GOP and Helms' campaign and obtained declaratory and injunctive relief in the form of a consent judgment and decree. What is the Department's position on whether vote caging is a violation of civil rights laws?

ANSWER: Whether "vote caging" constitutes a violation of the federal civil rights or election laws depends on the specific set of facts and circumstances. The Department stands ready to investigate any credible allegations that voters are being discriminated against on the basis of their race and is taking affirmative steps to ensure equal access to the polls for all citizens. To the extent that such "vote caging" may violate federal election law, the Civil Rights Division's Voting Section enforces three statutes that could be used to prevent unlawful disenfranchisement by alleged "vote caging."

First, the Department is charged with enforcing the National Voter Registration Act of 1993 (NVRA). As you know, the NVRA specifies voter registration procedures for federal elections. Specifically, Section 8 of the NVRA provides that the name of a registrant may be removed from the official list of eligible voters in only a few circumstances: (i) at the voter's request; (ii) as provided by State law, by reason of criminal conviction or mental incapacity; or (iii) under a program conducted by the State, as required by the NVRA, to remove ineligible voters who have died or have moved. Moreover, even a voter who is thought to have moved may be removed from the voter rolls only if he or she has failed to respond to a confirmatory mailing from the State and has failed to vote in two consecutive federal general elections. 42 U.S.C. §1973gg-6. Therefore, under federal law, a voter may *not* be removed from a voter registration list merely for failing to vote or because a private mailing sent to the voter was returned as undeliverable. To the extent that States remove voters from the registration rolls without following the protections afforded by the NVRA, the Department is prepared to take action as appropriate and, indeed, has already done so in several cases. *E.g.*, *United States* v. *Cibola County* (D.N.M. 2007); *United States* v. *Pulaski County* (E.D. Ark. 2004).

Second, the Department of Justice also enforces certain provisions of the Help America Vote Act of 2002 (HAVA). The Department is charged with enforcing Section 302(a) of HAVA, which provides that if an individual's name does not appear on the voter registration list, or if an election official asserts that the individual is not eligible to vote, but the individual asserts he or she is a registered voter and eligible to vote in a federal election, the individual is entitled to cast a provisional ballot in that election. If the appropriate state or local election official then determines that the individual is eligible under state law to vote, the individual's provisional ballot shall be counted in that election in accordance with state law. Additionally, states are required to establish a system by which individuals who cast provisional ballots may

determine whether their ballots were counted. 42 U.S.C. § 15482(a). To the extent that states fail to afford voters their rights under HAVA, the Department is prepared to take action as appropriate.

For example, on February 27, 2008, a U.S. District Court signed the consent decree resolving a lawsuit under Section 302(a) of HAVA against Bolivar County, Mississippi. The Department's complaint alleged that county officials violated Section 302(a) by failing to establish a free access system for voters to ascertain whether their provisional ballots were counted. The consent decree establishes procedures for Bolivar County officials to follow during federal elections regarding provisional ballots.

Finally, the Department of Justice enforces the Voting Rights Act of 1965. Pursuant to the Act, the Department monitors elections in various parts of the country with Department of Justice personnel and federal observers. 42 U.S.C. 1973a, 1973f. The Department's election monitoring program is a major component of its work to protect against illegal discrimination at the polls. Additionally, if the Department detects discrimination on the basis of race, color, or membership in a language minority group in voting practices or procedures, the Department may conduct an investigation and file suit under Section 2 of the Voting Rights Act. 42 U.S.C. 1973. For example, in 2006, the Department filed and resolved a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic-American voters – including at least three United States citizens on active duty with the United States Army – based entirely on their perceived race and ethnicity. The Department is vigorously enforcing Section 2 of the Voting Rights Act to ensure that voters are not discriminated against on the basis of race.[1]

As noted above, the Department's election monitoring program is a major component of its work to protect voters against illegal discrimination. In many cases, the presence of Department of Justice personnel alone may be enough to deter or prevent discrimination at the polls. Therefore, each year, the Department coordinates the deployment of hundreds of federal government employees in counties, cities, and towns across the country to monitor elections and to ensure equal access to the ballot. During calendar year 2004, a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 states. This compares to the 640 federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year. In 2006, the Department deployed a record number, for a mid-term election, of Department monitors and federal observers from the Office of Personnel Management to jurisdictions across the country. In total, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states during the November 7, 2006, election. Overall, in calendar year 2006, we sent over 1,500 federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

[1] The Department also continues to aggressively enforce Section 2 of the Voting Rights Act in other contexts. For example, most recently, on March 14, 2008, the Department settled a Section 2 lawsuit on behalf of African-Americans against the Georgetown County, South Carolina School Board. The suit challenged the board's at-large method of election on the grounds that it diluted the voting strength of African Americans. Additionally, in 2006, the Voting Section filed a Section 2 lawsuit challenging the at-large method of election in the City of Euclid, Ohio, on the grounds that it discriminated against African-American voters. The Department prevailed after trial in 2007 when the Court found a violation of Section 2. The Department filed another suit under Section 2 in 2006 challenging the at-large election system in Port Chester, New York, on the grounds that the system discriminated against Hispanic citizens. In January 2008, the Court ruled that the method of election violated Section 2.

Conyers 74 Has the Department's position against vote caging changed since 1990?

ANSWER: No. Please see the response to Question 73.

Conyers 75 There were complaints of vote caging in Florida, Nevada, Wisconsin, and Ohio in 2004. How many "vote caging" investigations were initiated by the DOJ in response to these complaints?

ANSWER: The Department investigated "vote caging" allegations in several states prior to the 2004 general election and deployed election monitors and observers to those states to protect against race-based challenges. For example, in response to allegations in Duval County, Florida, the Department's personnel negotiated an agreement that called for the elimination of vote caging lists as a basis for challenging voters at the polls on Election Day. In Nevada, local officials had already blocked inappropriate race-based challenges before they were brought to the Department's attention, and no subsequent problems were detected by our monitors. In Wisconsin, local officials effectively blocked any attempted interference with the voting rights of minority voters prior to Election Day. In other instances, the Department reviewed the available facts and determined that state and local officials were acting appropriately to protect the rights of all voters.

Conyers 76 Were there any prosecutions? If not, why?

ANSWER: Please see the response to Question 75.

Conyers 77 How do you plan to address complaints of vote caging during the upcoming election cycle?

ANSWER: As indicated in the response to Question 73, to the extent that states remove voters from the registration rolls without following the protections afforded by the NVRA, the Department is prepared to take action as appropriate. Similarly, to the extent that states fail to afford voters their rights under HAVA, the Department is prepared to take action as appropriate. Finally, the Department will monitor elections in various parts of the country to protect against illegal discrimination at the polls, and if the Department detects discrimination on the basis of race, color, or membership in a language minority group in voting practices or procedures, the Department may conduct an investigation and file suit under Section 2 of the Voting Rights Act. 42 U.S.C. 1973.

QUESTIONS FROM CONGRESSMAN SCOTT

Scott 84 During the oversight hearing on February 7, 2008, you stated that the Department of Justice will not enforce contempt citations for ignoring Congressional subpoenas against either White House Chief of Staff, Joshua Bolten, or former White House Counsel, Harriet Miers, because the President has ordered that neither Mr. Bolten nor Ms. Miers comply with the subpoenas on the basis of executive privilege. The relevant statute on enforcement of contempt citations states, in reference to the U.S. Attorney's responsibility, "whose duty it shall be to bring the matter before the grand jury for its action." Since this statutory language does not appear to leave the U.S. Attorney with discretion as to enforcement, what is the legal basis for your telling the U.S. Attorney for the District of Columbia not to present contempt citations to a grand jury as authorized by the U.S. House? Can executive privilege be claimed by the President to withhold the testimony of Administration aides when the President was not part of the conversations and has no knowledge of the matters that will be the basis of the testimony?

ANSWER: The Department's views regarding the contempt of Congress statute are well established. For a recent discussion of the Department's position and the relevant authorities, we refer you to the Attorney General's February 29, 2008, letter to Speaker Pelosi, as well as the Department's July 24, 2007, letter to Chairman Conyers. Copies of both letters are enclosed. With regard to your second question, it is well established that the scope of executive privilege extends well beyond actual conversations with the President.

Scott 86 During your confirmation hearing before the Senate Judiciary Committee, you stated that you would look into a finding that, during the Bush Administration, state and federal Democratic officeholders have been investigated by Department of Justice prosecutors six times more often than Republicans. That finding is included in a study by Professor Emeritus, Donald C. Shields, Ph.D., University of Missouri - Kansas City, and is entitled, "An Empirical Examination of the Political Profiling of Elected Officials: A Report on Selective Investigations and/or Indictments by the DOJ's U.S. Attorneys under Attorneys General Ashcroft and Gonzales." What steps have you taken in response to your promise to review that study?

ANSWER: The Department of Justice brings its prosecutions based on evidence, not on partisan politics. The Department does not keep statistics on the political affiliation of individuals investigated, charged, or convicted of public corruption. It has been – and remains – the practice of the Department to investigate and prosecute individuals who violate federal law without regard to their political affiliation. These investigations and prosecutions involve career prosecutors and experienced agents who analyze evidence from a law enforcement – not a partisan – perspective. The Attorney General has repeatedly reminded Department investigators and prosecutors that they should bring cases only based on the facts and the law and not based on any partisan considerations.

The Department carefully reviewed the study you cite and believes that it is fatally flawed. The study's principal author, in his written testimony before the House Judiciary Committee in October 2007, explained his motivation for conducting the study in this way: "The genesis of the . . . study flowed from the use of symbolic convergence theory to explain the unique merging of aspects of the religious-conservative and neo-conservative rhetorical visions (that is, composite rhetorical dramas that catch up large groups of people in a similar symbolic reality) held by then Attorney General John Ashcroft in his role as the nation's chief law enforcement officer." The study's principal author described the "data collection procedures" as consisting of "Google searches to retrieve electronic accounts of federal grand jury investigations." Specifically, the authors ran Google searches for the terms "federal grand jury investigation," "federal public corruption investigation," and "elected," and then supplemented those searches with a review of publicly available press releases from United States Attorneys' Offices.

This methodological approach is inadequate for a number of reasons. First, it captures only those stories that use the precise search terms used. Second, Google searches only capture stories published and readily available online, but because of the secrecy of grand jury investigations, the news media cannot know who is under federal investigation. Thus, any news accounts about purported "investigations" are necessarily incomplete and unreliable as a true gauge of who is and is not under investigation.

The study is also flawed because it uses an expansive definition of "investigate" that does not comport with the common sense meaning of that word. As the principal author explained, "My use of the word *investigate* is a common definition. It refers to someone subpoenaed for records, or to testify, or arrested or indicted for allegedly perpetrating some federal offense." But it is incorrect to say that persons "subpoenaed for records, or to testify" are therefore necessarily being investigated. One cannot equate the two, and any study that counts such persons as being "under investigation" will be inaccurate.

Scott 89 On February 25, 2007, Americans United for Separation of Church and State sent a letter to the Department of Justice and three other cabinet departments challenging the constitutionality of ten earmarks designated for religious institutions and raising constitutional concerns about sixteen others. The letter is attached hereto. Please identify what actions you intend to take in response to this letter. When do you plan to issue a formal response to the letter?

ANSWER: The Department of Justice has responded to this letter.

Scott 90 Have any of these earmarks already been paid out?

ANSWER: No, none of the DOJ earmarks have already been paid out or authorized to be drawn down by grantees.

Scott 91 When are these earmarks scheduled to be paid out? If you are uncertain about exact timing, please give approximate timeframes in response to this and any other questions concerning timing.

ANSWER: In accordance with the Consolidated Appropriations Act of FY 2008 (P.L. 110-161) and Section 4 of the accompanying explanatory statement, the Department has submitted an FY 2008 operating plan, including the proposed plan for the administration of congressionally mandated earmarks, to the House and Senate Appropriations Committees for approval. The operating plan has subsequently been approved by Congress and we expect to make award announcements no later than the end of the Fiscal Year.

It is important to note that the acceptance of a congressionally mandated award does not mean that applicants are "paid out," but means that they now have access to the funds awarded. They can obligate funds and draw down reimbursements in accordance with rules and regulations for Federal grants and as provided in the Justice Department's Office of Justice Programs Financial Guide.

Scott 92 Do you plan to delay payment of the earmarks while you investigate the allegations in the letter? If so, for how long?

ANSWER: As it does with all applications for federal funding, the Department will carefully review the applications to ensure that federal funds will not be used for any activity that is proscribed by federal constitutional, statutory, or regulatory requirements.

Scott 93 What is your substantive response to the allegations in the letter that ten of the earmarks appear unconstitutional and sixteen other ones raise serious constitutional issues?

ANSWER: All applications for federal funding are carefully reviewed to ensure that the applicant's proposed activities comply with all federal constitutional, statutory, and regulatory requirements.

Consistent with President George W. Bush's Executive Order 13279, dated December 12, 2002, and 28 C.F.R. Part 38, faith-based and other community organizations identified to receive a congressionally mandated award will be treated on an equal basis with all other grantees in the administration of awards. No eligible grantee will be discriminated for or against on the basis of its religious character or affiliation, religious name, or the religious composition of its board of directors or persons working in the organization.

Faith-based organizations receiving Department of Justice assistance awards retain their independence and do not lose or have to modify their religious identity (e.g., removing religious symbols) to receive assistance awards. DOJ grant funds, however, may not be used to fund any inherently religious activity, such as prayer or worship. Inherently religious activity is permissible, although it cannot occur during an activity funded with DOJ grant funds; rather,

such religious activity must be separate in time or place from the DOJ-funded program. Further, participation in such activity by individuals receiving services must be voluntary. Programs funded by DOJ are not permitted to discriminate in the provision of services on the basis of a beneficiary's religion.

Scott 94 What documents do the Department of Justice and the three other affected cabinet departments have in their possession that relate to these earmarks and/or the institutions or programs that are to be funded by the earmarks?

ANSWER: Please see the response to Question 95 regarding documents in the possession of the Department of Justice.

Scott 95 Please provide the Committee with all documents relating to the 26 earmarks, including but not limited to any correspondence concerning the earmarks (including both internal correspondence/memoranda and correspondence with the entities to be funded, and including electronic correspondence), grant applications relating to the earmarks, grant agreements or contracts relating to the earmarks, payment records relating to the earmarks, and all other documents in each department's files concerning each earmark.

ANSWER: The Department responded to this request via letter dated June 2, 2008.

QUESTIONS FROM CONGRESSWOMAN SÁNCHEZ

Sánchez 96 During the seven years of the Bush Administration, Members on this Committee have requested the appointment of independent special counsels dozens of times, including requests to investigate the leak of a covert CIA agent as well as the destruction of videotapes depicting waterboarding. Despite these requests, this Administration has never appointed a special counsel under the regulations.Do you think the special counsel regulations serve a purpose? If yes, why are they routinely disregarded by the Department? If no, why not?

ANSWER: Yes, we believe that the Special Counsel regulations serve an important purpose, and they are not disregarded by the Department.

The Special Counsel regulations, set forth in 28 C.F.R. § 600.1, were designed as a more flexible replacement for the rigid requirements of the former Independent Counsel Act, and provide for the discretionary appointment of a Special Counsel under certain narrow circumstances. Specifically, the Attorney General (or the Acting Attorney General in cases in which the Attorney General is recused) is authorized to appoint a Special Counsel if he or she determines: (1) that criminal investigation of a person or matter is warranted; (2) that investigation or prosecution by the Department of Justice would create a potential conflict of interest or other extraordinary circumstances; and (3) that the public interest would be served by

such an appointment. The first two conditions are similar to the former statutory thresholds that, once satisfied, triggered automatic appointment of an Independent Counsel. The third condition recognizes the need to balance various potentially competing public interests in this difficult and sensitive area of criminal law enforcement.

Sánchez 97 Should Congress bring back the Independent Counsel Statute or a similar mechanism to ensure that an investigation is sufficiently independent when the Department has a conflict of interest? Why or why not?

ANSWER: The former Independent Counsel Act, with its inflexible and low threshold for the appointment of an Independent Counsel, was heavily criticized from many quarters and was allowed to lapse because it was wasteful, inflexible, and unnecessary. The Department does not support enactment of such a mechanism again. The career professionals in the Department, including the FBI, have a long history of professionally, independently, and impartially handling investigations and prosecutions involving high-level officials in the Executive Branch and Congress from both political parties. The Department has regulations in place, 28 CFR Part 600, that provide for the appointment of a Special Counsel where the Attorney General determines that an investigation or prosecution "would present a conflict of interest for the Department or other extraordinary circumstances" and that "under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." 28 CFR § 600.1. No additional statutory mechanism is needed.

Sánchez 98 At the House Judiciary Committee's oversight hearing of the Department of Justice, you testified that "waterboarding, because it was authorized to be part of the program, pursuant to approach -- that it was authorized to be part of the CIA program, cannot possibly be the subject of a criminal -- a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice." Given the fact that you acknowledged a clear conflict of interest for the Department in investigating possible criminal violations by those who engaged in waterboarding, should a special counsel under the regulations be appointed to conduct a criminal investigation? Please explain.

ANSWER: No. The fact that the Department of Justice provided legal advice to a government agency does not constitute a conflict of interest warranting the appointment of a special counsel. If it did, then no government agency could ever rely upon the Department's advice. It is vital, however, that our intelligence professionals be able to trust the advice of the Department. Accordingly, no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice. The Department of Justice does not have any conflict of interest in applying such a principle, which is required by law and by fundamental fairness.

Sánchez 104 If yes, did you request money for SCAAP when you submitted your budget request for FY2009?

ANSWER: Diverse law enforcement and criminal justice priorities and concerns continued to be required of the Department for FY 2009, which did not allow SCAAP to be included in this budget request.

In keeping with the Department's mission "to ensure public safety against threats foreign and domestic," the President's FY 2009 Budget request consolidates the Department's most successful state and local law enforcement assistance programs into four flexible, competitive discretionary grant programs. This approach would help state, local, and tribal governments develop programs appropriate to the particular needs of their jurisdictions. Through the competitive grant process, the Department's Office of Justice Programs (OJP) would continue to assist communities in addressing a number of high-priority concerns. Specifically, the budget request includes more than $1 billion in state, local and tribal law enforcement assistance and consolidates more than 70 existing OJP programs into four larger, multi-purpose grant programs: 1) the Violent Crime Reduction Partnership Initiative; 2) the Byrne Public Safety and Protection Program; 3) the Child Safety and Juvenile Justice Program; and 4) Violence Against Women Grants. Under the Byrne Public Safety and Protection Program, jurisdictions could apply for law enforcement funding to meet similar needs. SCAAP is a form of revenue sharing rather than a grant program.

Sánchez 109 The 2007 Annual Report of the Ombudsman to USCIS indicates that FBI name checks are a significant source of case backlogs for immigrants seeking visas. In this year alone, the backlog of cases pending because of FBI name checks rose by 93,358. The number of cases pending for more than 33 months rose to 31,144, and increase of 44 percent. Why are these backlogs increasing?

ANSWER: FBI records indicate that, as of July 14, 2008, 16 USCIS name checks have been pending for more than 33 months. In FY 2007 there was a temporary increase in pending USCIS name checks due to an increase in the volume of incoming USCIS name checks, which increased from 1,633,349 in FY 2006 to 2,113,323 in FY 2007 (a 23% increase) without an increase in resources.

QUESTION FROM CONGRESSMAN DAVIS

Davis 114 In response to a series of questions from me, you testified that it would be "inappropriate" for a prosecutor to "entertain" communications from a political figure urging the prosecution of any individual. You testified that you and the Department had not investigated whether the claims of Simpson, Iglesias, and McKay are truthful. Would the Department of Justice consider efforts by political figures to influence the prosecution of cases to be either a violation of either Department guidelines or of provisions of the United States Criminal Code? If so, why has the Department declined to conduct additional investigation of sworn claims that such interventions happened?

ANSWER: Whether any particular effort by a political figure to influence a prosecution of a case would constitute a violation of Department guidelines or the provisions of the United States Criminal Code would depend on the specifics of that effort. Long-standing Department policy requires that United States Attorneys notify the Executive Office for United States Attorneys of any Congressional request for non-public information. Generally, this requirement will result in a response to the Congressional request from the Office of Legislative Affairs or the Executive Office for United States Attorneys. In addition, on December 19, 2007, the Attorney General issued a memorandum to Component Heads and United States Attorneys setting forth the Department's policy on contacts between the Department and the White House. The new policy assures that contacts with the White House regarding pending matters involve in the first instance only the Attorney General, Deputy Attorney General, or Associate Attorney General. In addition, we have previously discouraged Members of Congress from contacting us about pending investigations or cases. We further requested that, in those cases where Members of Congress or their staffs deem it essential to make inquiries concerning pending matters, such inquiries be made in writing to either the Attorney General, Deputy Attorney General, Associate Attorney General, or Assistant Attorney General for Legislative Affairs. These policies are designed to assure that improper political influence plays no role in the disposition of matters that the Department handles.

QUESTIONS FROM CONGRESSMAN ELLISON

Ellison 115 Attorney General Muksasey, I want to bring your attention to investigations of the firing and hiring of US Attorneys. Yes or No, are you familiar with the case of Rachel Paulose?

ANSWER: Yes.

Ellison 116 I have in my possession a letter sent to your office dated January 25, 2008 from the Office of Special Counsel Scott Bloch that raises serious concerns about your office's conduct in dealing with Ms. Paulose's case. Let me quote from the letter: "I am writing you because we are impeded in our investigations of the US Department of Justice in several areas….in our investigation into political intrusion into personnel decision making, and in the matter of former U.S. Attorney Rachel Paulose." Specifically, Special Counsel Bloch claims that the response by your department has been insufficient and raises some serious issues concerning the conduct of your department: "On December 11, 2007, I received a letter from Associate Deputy Attorney General David Margolis regarding allegations from John Marti about USA Rachel Paulose… Mr. Margolis took issue with my finding of a substantial likelihood that USA Paulose grossly mismanaged her office, and abused her authority. He expressed strong disagreement with what he refers to my characterizations of USA Paulose's actions, and requested reconsideration of my finding." Special Counsel Bloch states: "The letter from Margolis does not meet the statutory criteria for investigation and reporting to me. Rather it expresses Mr. Margolis' opinion that the allegations, if true, do not constitute gross mismanagement and an abuse of

authority. This is wholly insufficient and reflects a deliberate disregard for the law under which OSC operates and with which you are obligated to comply." Yes or No, have you responded to Mr. Bloch's letter?

ANSWER: On February 6, 2008, the Department responded to the cited portion of Mr. Bloch's letter. On that same date, the Department sent a copy of that response to the Chairman and Ranking Member of the House Judiciary Committee.

Ellison 117 AG Mukasey, what position does Rachel Paulose hold now in your Department?

ANSWER: Ms. Paulose joined the Department's Office of Legal Policy on January 6, 2008, as a Counselor to the Assistant Attorney General for Legal Policy.

Ellison 118 What are Ms. Paulose's responsibilities?

ANSWER: As a member of senior staff, Ms. Paulose is expected to manage a portfolio with a range of policy issues.

Ellison 119 Why was Ms. Paulose recalled to Washington DC?

ANSWER: Ms. Paulose was not recalled to Washington D.C. It was her decision to step down and accept a position at Main Justice.

QUESTIONS FROM CONGRESSMAN GOODLATTE

Goodlatte 122 In my district, the 6th District of Virginia, we are seeing increased gang activity, especially among international gangs. This is extremely concerning to me and my constituents, and I have worked hard to help get federal, state and local law enforcement the resources necessary to combat these gangs. Are gangs and gang violence still on the rise nationally?

ANSWER: Gangs, which have existed in urban areas throughout the United States for at least the last three decades, have emerged as a primary public safety concern to law enforcement officials in many suburban and rural areas. Gang members often migrate from urban areas to suburban and rural locales in order to expand their areas of operation and generate additional income; they also seek to escape law enforcement operations targeting gang activity. At present, more than 20,000 gangs consisting of approximately 1 million members exist in all regions of the United States. Gangs are present in all 50 states, the District of Columbia, and all U.S. territories. (These numbers do not include the approximately 120,000 prison gang members who continue to control criminal operations from within their facilities.) Of these gang groups, 39

have been identified as national threats based on their significant violent criminal activities and interstate or international ties. The FBI-led National Gang Intelligence Center (NGIC) has estimated the direct economic impact of gang activity in the United States at $5 billion and the indirect impact as much greater. This corresponds with an increase in inquiries from local law enforcement agencies in rural and suburban areas expressing interest in participating in FBI-sponsored Safe Streets Task Forces, which are addressing high volumes of homicides, assaults, armed robberies and drug-related violent crimes. National Drug Intelligence Center (NDIC) National Drug Threat Survey (NDTS) data reveal that the number of law enforcement agencies reporting drug distribution by street gangs in their jurisdictions increased from 44.6 percent in 2003 to 58.3 percent in 2007.

In addressing gang-related violence, the Department of Justice has employed a number of prevention, intervention, and suppression strategies that are by design collaborative in nature and are strategically targeted to respond to the unique concerns of law enforcement officials, community groups, and policy makers at the local, regional, national, and international levels. The Department's comprehensive plan to combat gangs across America is twofold: First, prioritize prevention programs to provide America's youth, as well as offenders returning to the community, with opportunities that help them resist gang involvement; second, ensure robust enforcement policies when gang-related violence does occur. This comprehensive plan to combat gangs and gang violence also recognizes the critical need of local law enforcement and local community groups to continue to work hand-in-hand on the front lines in the war against gang violence. The *Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas, April 2008* provides additional information about the threat these gangs pose and the Department's efforts to address that threat.

To address the growing gang problem, the FBI has focused on augmenting the number of Safe Streets Task Forces, increasing from 47 gang task forces to 141 since 2001, with a related increase in the number of task force arrests of gang members from 3,999 in 2001 to 7,256 in FY 2007. Likewise, ATF has expanded the number of its Violent Crime Impact Teams to 31 in FY 2008, with a related increase in the number of convictions of defendants in firearm-related violent crime investigations from 5,481 in FY 2001 to 9,717 in FY 2007. Those convicted in FY 2007 include 2,142 gang-related defendants and 1,620 defendants in firearms trafficking cases. Through DOJ's Anti-Gang initiative, the FBI and ATF are active participants in the Gang Targeting Enforcement and Coordination Center (GangTECC), which is a multi-agency task force established to assist in targeting significant national gangs for prosecution. In addition, the FBI leads the MS-13 National Gang Task Force, working closely with the El Salvador government in targeting the MS-13 and 18th Street gangs. During the past several years ATF, working in partnership with state and local law enforcement, has brought RICO indictments against MS-13 in Maryland, where ATF and the U.S. Attorney's Office have charged 40 MS-13 gang members with various federal offenses. Twenty-nine of these defendants have been charged with RICO, including, for the first time, three MS-13 members in El Salvador.

National-level gangs pose a significant threat to suburban areas due to increased connections with transnational criminal organizations and drug trafficking organizations (DTOs), according to the NDIC. Many gangs have developed or strengthened relationships with transnational criminal organizations and DTOs. These relationships provide gangs with access

to international sources of supply for illicit drugs that they commonly distribute in urban, suburban, and rural communities. Many gangs are also increasing their level of sophistication; a number have become profit-generating enterprises with global connections and advanced communications capabilities. At least 23 gangs have been identified by law enforcement officials as national level gangs, operating in multiple states and/or numerous major drug markets. Moreover, law enforcement officials have documented connections between transnational DTOs and 11 national level street gangs, 6 national-level prison gangs, 4 national-level OMGs, 2 regional-level street gangs, 1 regional-level prison gang, and 3 local prison gangs.

Gangs dominate retail-level drug distribution and increasingly are becoming involved in wholesale-level drug trafficking. According to the NDIC 2007 NDTS, gangs are involved in drug distribution in every state in the country, principally in urban and suburban areas, but also in rural communities. Moreover, NDTS trend data reveal a 13.7 percent increase between 2003 and 2007 in the number of law enforcement agencies reporting drug distribution by street gangs in their jurisdictions. NDTS trend data further reveal that the primary drug distributed by gangs is marijuana followed by powder cocaine, crack cocaine, methamphetamine, heroin, MDMA, and diverted pharmaceuticals.

Goodlatte 124 It appears that online pornography and obscenity are on the rise. I have been appalled to hear reports of websites like YouPorn.com and PornoTube.com, which let users upload and view hardcore sex videos in formats similar to Youtube. According to one Internet-ranking company, YouPorn.com even ranks higher than CNN.com, About.com and Weather.com in the average number of web visits per month. With this easy access to hardcore pornography, children are much more likely to be exposed to it than they were, say 10 or 15 years ago. Is it still a DOJ priority to prosecute pornography and obscenity crimes online?

ANSWER: The Department is committed to prosecuting obscenity crimes online and continues to make strides in the number and quality of obscenity prosecutions. For example, on June 4, 2008, a federal jury in Tampa, Florida, convicted Hollywood producer Paul Little, a/k/a Max Hardcore, and his company, MaxWorld Entertainment Inc., on five counts of transporting obscene matter by use of an interactive computer service and five counts of mailing obscene matter. The material included films featuring severe violence towards female performers.

In 2005, the Department's Criminal Division established the Obscenity Prosecution Task Force, whose singular focus is the prosecution of adult obscenity as defined by the Supreme Court. The Criminal Division's Child Exploitation and Obscenity Section and U.S. Attorney's Offices around the country also prosecute adult obscenity cases in coordination with law enforcement. These cases include prosecution of offenders producing and/or distributing obscene materials over the Internet. In addition, the Department continues to use new legislative tools, including the PROTECT Act and the CAN-SPAM Act, to respond to changes in technology used to commit these crimes. The Department has secured more than 57 convictions on obscenity or related charges since 2001, with a number of additional defendants charged and awaiting trial.

Examples of other recent obscenity prosecutions include:

- On April 8, 2008, prominent California adult film producer John Stagliano and his two production companies were indicted by a federal grand jury in Washington, D.C. on charges of distributing obscenity over the Internet and related offenses.

- On May 20, 2008, a federal jury in Martinsburg, WV returned an indictment against an Indiana man with a long history of distributing extreme forms of hard-core obscenity throughout the United States.

The Department likewise remains deeply committed to the fight against Internet-based child exploitation crimes. In February of 2006, the Department introduced Project Safe Childhood ("PSC"), an initiative designed to protect children from online exploitation and abuse. The goal of PSC is to enhance the national response to the growing threat of computer-facilitated sexual exploitation crimes to America's youth.

PSC creates, on a national platform, locally designed partnerships to investigate and prosecute Internet-based crimes against children. DOJ's Child Exploitation and Obscenity Section (CEOS) works with U.S. Attorney's Offices, Federal, State, and Local law enforcement agencies, Internet Crimes Against Children Task Forces, and PSC partners such as the National Center for Missing & Exploited Children (NCMEC), and others on this important initiative. Project Safe Childhood has had a great impact nationwide.

Goodlatte 125 Are there any additional tools that Congress can give DOJ to help combat this growing scourge?

ANSWER: The Department is grateful for all of the tools given to it by Congress, and for Congress's commitment to doing all it can to protect the public from Internet-based exploitation crimes. Title II of the Department's proposed Violent Crime and Anti-Terrorism Act of 2007, which was sent to Congress last June, includes several provisions which would be helpful tools in the fight to protect children. Among other things, the provisions in Title II would create a mandatory minimum sentence for possession of sexually abusive images of children, would prohibit accessing sexually abusive images of children with intent to view them, would strengthen the procedure available to ensure that electronic service providers report child exploitation crimes detected on their systems, and would require restitution for certain victims of child exploitation. A number of provisions in Title II would fix problematic gaps and loopholes in current child exploitation laws. We welcome the opportunity to work with Congress on all of the proposals in Title II.

The Department has prepared additional legislative proposals pertaining to child exploitation. Among other things, the proposals would make it a federal crime to transmit live images of child sexual abuse (such as through the use of a web cam), would prohibit the creation of a sexually abusive image of a child through the modification of an image of a real child, and would broaden the basis for federal jurisdiction in child pornography related offenses.